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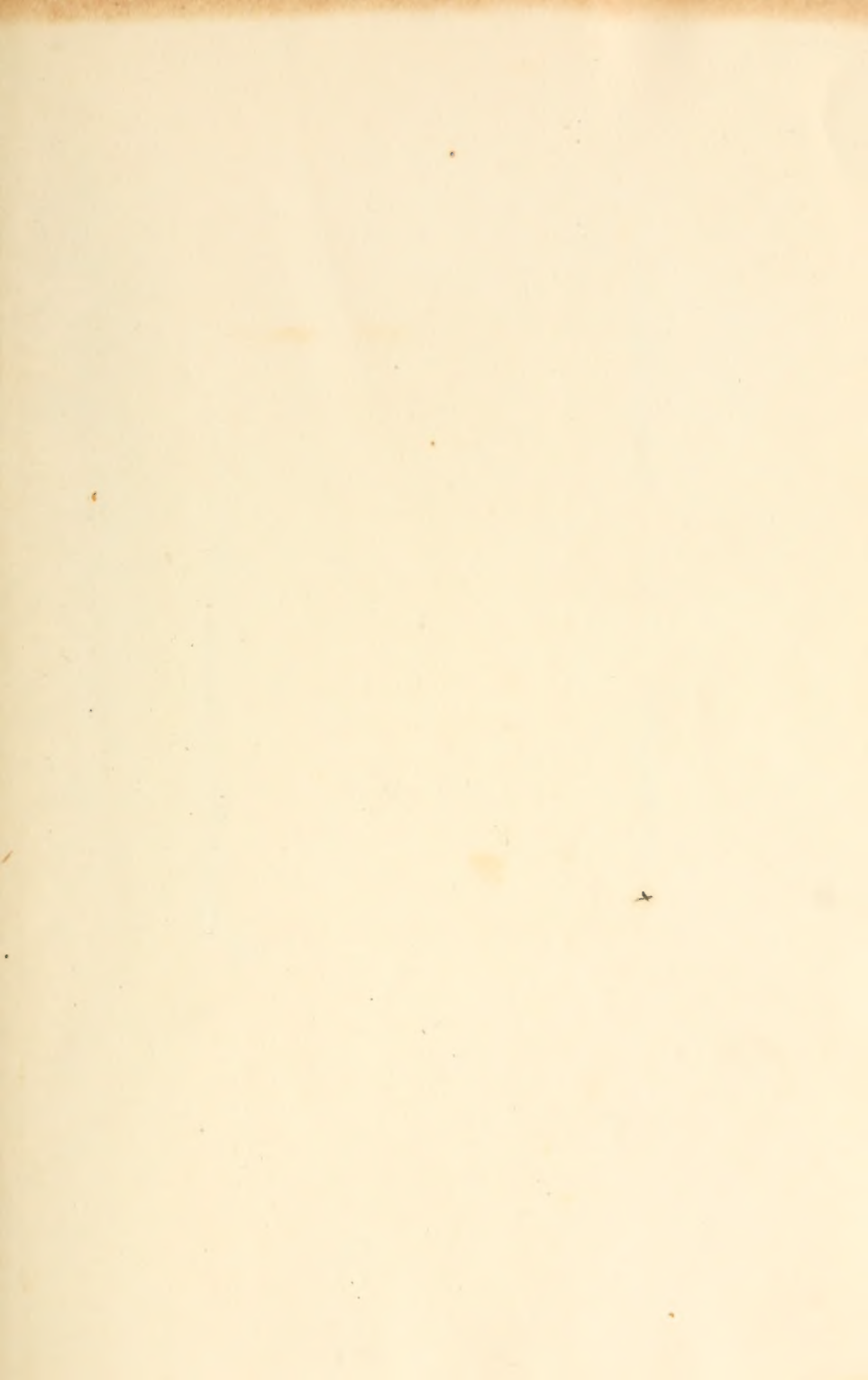


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A TREATISE
ON THE LAW OF
TELEGRAPH AND TELEPHONE
COMPANIES

BY
S. WALTER JONES

KANSAS CITY, MO.
VERNON LAW BOOK COMPANY
1906

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TO THE
HON. JAMES C. LONGSTREET
OF MISSISSIPPI,
SCHOLAR, LAWYER, GENTLEMAN.

PREFACE.

THERE are no institutions with corporate functions which have grown so rapidly and which have become so convenient, so necessary and so absolutely indispensable to the commercial interests of the world as telegraph and telephone companies. Many can yet remember when the public news was conveyed by the slow and unreliable means of the stage-coach, but now every city and nearly every town, village and country place is enjoying the conveniences of these institutions; and soon a perfect network of telephone wires will connect the farmhouses with the towns and cities, bearing the news of each day's important happenings.

It must follow, therefore, that the construction, operation and maintenance of telegraph and telephone lines, affecting such a wide diversity of interests, has been and always will be a constant source of litigation. The author has sought in this treatise to set forth clearly and concisely the legal rights, duties and liabilities of these public service corporations, with respect to the public and to the individual.

Several years ago, when the science of telegraphy was new to the world, there were two books written on the subject of Telegraph Companies, but these authors had to deal with the first stages of the subject's development; and, without any reflection on the writers or their books, the law applicable to these companies at that time has since undergone many changes.

We believe this is the only treatise on the combined subject of Telegraph and Telephone Companies. Consequently the author has labored under many difficulties. It has been necessary to resort to the original sources of the law, as well as to examine and analyze the many decisions of the courts that have sought to apply the law to

these companies. Great care has been exercised to secure accuracy in the citation of cases; and for the convenience of the profession, but with considerable labor and expense, parallel references are given to the principal systems of reports and reporters.

We believe that every principle of law applicable to these companies has been carefully and fully set forth in this work. How well we have succeeded in this task must be judged from the work itself. We ask the indulgence of the profession for any errors that may appear in the text.

October 1, 1906.

S. WALTER JONES.

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THE LAW OF TELEGRAPH AND TELEPHONE COMPANIES.

CHAPTER 1.

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§ 1. Definition.

There are many different definitions of the words, "telegraph," and "telephone," and the reader must consult his own judgment as to the correctness of each. Some of the writers define them as, "an instrument or apparatus, which by means of iron wires, conducting the electric fluid, conveys intelligence to any given distance with the velocity of lightning;"¹ or, "a machine for communicating intelligence from a distance by various signals or movements previously agreed on; which signals represent letters, words, and ideas, which can be transmitted from one

¹ Webster's Int. Dic.

station to another as far as the signals can be seen:"² or, "public vehicles of intelligence."³ These, and other definitions,⁴ seem to us to contain too much irrelevant matter. For instance, it is not necessary to enumerate the different parts which make up and constitute the machines and apparatus by means of which messages are sent; because there are so many improvements being made daily on these machines, and in the course of time, so many additional improvements may be made as not to permit them to fall within the definition now given. A definition of anything should be sufficiently comprehensive to cover the subject for all time to come. We think that the following will meet all of these requirements; not only will it comprehend and cover every part of the different machines which does or shall constitute the entire apparatus, but it will be full enough to take in all the different means by which intelligence is communicated:

It is an apparatus or process by means of which intelligence is transmitted, either by signals or sounds to points beyond the limit of ordinary audibility. There are different machines which, put together, constitute this apparatus or means through which communications are made. For instance there is a battery, or other sources of electric power; a line wire or conductor for conveying the electric current from one station to another; the apparatus for transmitting, interrupting, and if necessary, reversing the electric current at pleasure: and the indicator, or signal instrument.⁵ There are

² Webster's Int. Dic.

³ Fire Insurance Association of England v. Merchants' & Miners' Trans. Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162. "The word 'telegraph' is now generally understood as referring to the entire system of appliances used in the transmission of telegraphic messages by electricity, consisting of: (1) a battery or other source of electric power; (2) a line wire or conductor for conveying the electric current from one to another; (3) the apparatus for transmitting, interrupting, and if necessary, reversing, the electric current at pleasure; and (4) the indicator, or signal-

ing instrument." See Imperial Dic.; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 210; Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co., 66 Md. 399, 59 Am. Rep. 167, 7 Atl. 809. See, also, Atty.-Gen. v. Edison Tel. Co., 6 Q. B. D. 248. Telegraph line or system, as used in ordinary statutes, will not embrace a distinct telegraph system. See Toledo v. West. U. Tel. Co., 107 Fed. 10, 46 C. C. A. 111.

⁴ Central Union Tel. Co. v. Falley, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

⁵ Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 210.

different means by which intelligence is transmitted; as by telephone; by the telegraph which may be either by a line wire or without any wire at all—or wireless telegraph; and by means of the speaking tube. The several apparatuses may be quite different in their construction but by means of each the same object is accomplished. They all convey intelligence either by signals, by letters or by sounds; or, by the voice transmitted beyond the limit of ordinary natural sight or audibility; the last part of this definition may have the tendency to exclude therefrom the speaking tube. While the last-named device is, strictly speaking, a telephone, under its generic term, yet it will hardly be so considered in a special way and will not be thus understood under the present discussion; since in the recent improvements in telephonic instruments, the telephone is technically and primarily restricted to an instrument or device which transmits sound by means of electricity and by wires similar to telegraphic wires.

We do not care to be understood as saying that this definition is broad and definite enough to describe the different systems in such a manner as would enable any one to make a distinction between them; nor do we intend to convey the idea that they are one and the same thing. And here, it might be said, a definition is a peculiar one which attempts to define two or more different and distinct objects when it describes neither of them sufficiently so that the one may be distinguished from the other.⁶ In a sense, this is true, but as a means to an end—an accomplishment of the same purpose—this definition is sufficiently broad, clear and distinct to comprehend all systems, and definite enough for that purpose to describe each. They are so similar in nature that when the law speaks of one, it generally means the other also.

§ 2. Distinction between telegraph and telephone companies—similarities.

In preparing a work in which two different subjects are to be treated as nearly as possible as being one and the same, it may be proper at the outset to draw and set forth the distinguishing feat-

⁶ *Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 210.

ures between the two in order to determine the application of the law to each. Therefore, in applying the rule generally it will be our purpose to apply it specifically by attempting to briefly state the similarities and dissimilarities between telephone and telegraph companies as they are being discussed under one title. In almost every respect these companies are very similar, if not identical, with respect to their construction. Each of them must erect its posts or poles and upon the tops of these attach its lines of wires from point to point, when it is not otherwise provided that they are to be placed under the surface. Each must have offices or connecting exchanges with operators or employees thereat. Each must almost necessarily enter upon, along, or across public roads, highways, streams, bodies of water and upon lands of individuals for the purposes mentioned.⁷ In this respect they are identical, and the same law—common and statutory—applies to both.

§ 3. Same continued—dissimilarities.

While the object of these two companies is to accomplish the same purpose—the transmission of intelligence from place to place by means of electricity—the manner in which this object is accomplished is not the same, and this is wherein they are materially different—and this, too, to a certain extent with respect to the application of the law to the two. In order to be able to transmit news intelligently over telegraph lines, there must be some one skilled in telegraphy to operate the telegraphic instruments and machines. It requires much time and experience for a person to become familiar with the science and art of telegraphy so as to be able to control successfully and promptly, the amount of news necessarily and naturally carried by these companies. While, on the other hand, any one without experience can converse with easy understanding over a telephone line where the connections are properly made. There may be instances where the telephone could not take the place of the telegraph, but as a general thing, they will be more convenient and of less expense than the latter. Almost all the commercial business, especially in large cities, is carried on over telephone lines. Men of all

⁷ Wisconsin Tel. Co. v. City of Oshkosh, 62 Wis. 36, 21 N. W. 828.

professions and avocations of life may and do have their offices and business houses supplied with telephone facilities. When they have good connections at the exchanges it is no trouble to transact any kind of business over the telephone lines; but, to have the same connections with telegraph lines, would necessitate all the patrons to have skilled telegraph operators both to receive and transmit their business messages.

§ 4. Same continued—liabilities of one greater than the other.

It is further true that on account of the different methods by which the communication of intelligence is made, liabilities for the negligent transmission of a message is not so liable to arise in one as in the other. Messages sent by a telegraph company are communicated, not directly by the parties themselves, but by third parties; or, more strictly and correctly speaking, by operators who are presumed to be skilled in their business as employees of the company. To err is human and they, who are human, are most liable to err in the transmission of news, either by not being prompt in the transmission, or by not sending the same correctly: when they are guilty of either or both of such errors, the company will be liable. On the other hand, all that is required of the operators or employees of a telephone company, is to give proper connection and similar accommodations to all who apply to them. Then, with respect to the accuracy of the message, the parties themselves can hold none save themselves liable. They come in direct contact and can converse with each other with the same distinct and clear understanding as if they were not only together in voice but in person: and errors out of which actions might otherwise arise, should it have been made in a telegram, may be easily corrected by the parties themselves. To this extent telephone companies are not subjected to the same liabilities with which telegraph companies are most often confronted. It is true that the telephone companies stand in the same relation to those who are carrying on communications over their lines as that of telegraph companies, and the same law is applicable to both but the distinction desired to be drawn and the apparent difference and misunderstanding of the law applicable thereto, arises from the two methods by which the communications are made. While in one the liability

of the company which would be caused by the negligence of the employee in the transmission of the message, might be avoided by the other on the ground that the negligence was not that of the company but the patrons themselves. In one, the company would be to a certain extent acting in the capacity of an agent for the two parties and be controlled under the laws of agency; while in the other, during the course of communication, the company would not be considered as an agent and thereby subjected to the laws of agency. Suppose, for instance, there is a proposition made over a telegraph line to sell certain property at a certain price but in the transmission of this proposition the company negligently altered or changed the price for which the property was proposed to be sold, and the addressee of the message accepts the proposition at its altered price. In this case, it is not right that either the owner of the property or the acceptor of the same should suffer from the error negligently made by the company; but the company which acts in the capacity of agent should suffer for his own negligence and be liable under the laws of agency.⁸ If the same transaction should have been carried on over a telephone by the contracting parties and the sale had been consummated for a price not intended but as understood by the contracting parties in their conversation, they and not the company would be the parties to suffer. Yet if the error had been made by the employees of the company it would be liable. For instance if the conversation was carried on by one of the contracting parties and an employee of the company who was conducting or carrying on the conversation as dictated to him, and he should mistake or misunderstand the conversation whereby an injury was inflicted, the company would be liable for such injury. In offering and acting as one of the communicants, he subjects the company as their agency through which the transaction is conducted.

§ 5. Telegraph in statutes—embrace telephone.

The science of telegraphy was very generally used long prior to the invention of the telephone. Statutes had been enacted in which certain rights and privileges had been granted and duties and obli-

⁸ See chapter on "Company Agent for Sender."

gations imposed on these companies without any reference to any other mode of communication of intelligence by means of electricity, save that by telegraph. To be sure, it would have been impossible to have made references to something which was not in existence. This being the case, the question which puzzled the courts at the time when telephones first began to be used to any extent was, How such statutes should be construed? Could such statutes which mentioned only the name "telegraph" embrace and have reference to "telephones?" By determining this question, by reason of which the proper construction may have been placed on these statutes, the definition of telephone would and should have taken a conspicuous part. Under our definition, it would most assuredly have been comprehended and embraced under the name of telegraph; which, as Mr. Anderson very wisely says, includes any apparatus for transmitting messages or other communications by means of electrical signals,⁹ although such companies are not specifically mentioned therein,¹⁰ or known at the time the act was passed.¹¹

§ 6. Same continued—reason.

It has been held by most of the courts if not all that where a statute imposes certain rights, duties and obligations on telegraph companies—expressly mentioning these companies without reference to any other mode of communication—the same embraces telephone

⁹ Anderson's Law Dictionary.

¹⁰ *Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 144; *Wis. Tel. Co. v. City of Oshkosh*, 62 Wis. 32, 21 N. W. 828; *Cumberland Tel., etc., Co. v. United Electric Co.*, 42 Fed. 273; *Davis v. Pacific Tel., etc. Co.*, 127 Cal. 312, 59 Pac. 698; *Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Maryland 399, 7 Atl. 809, 59 Am. Rep. 167; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278n; *Roake v. American Tel., etc., Co.*, 41 N. J. Eq. 35, 2 Atl. 619; *Duke v. Central New*

Jersey Co., 53 N. J. L. 341, 21 Atl. 860; *New York, etc., Tel. Co. v. Bound Brook*, 66 N. J. L. 168, 48 Atl. 1022; *Bell Tel. Co. v. Com.*, 38 Atl. 825; *Taggart v. Interstate Tel. Co.*, 16 Montg. Co. Law Rep. Pa. 155.

¹¹ *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278n; *Atty.-Gen. v. Edison Tel. Co.*, 60 Q. B. D. 244, 20 Meak 602. Compare *Richmond v. Southern Bell Tel., etc. Co.*, 174 U. S. 761, 19 S. Ct. Rep. 778.

companies as well,¹² unless there are other special controlling conditions which would produce a different result. It is true that the methods by which the intelligence is transmitted by the telegraph and telephone companies are somewhat different, yet there is quite a similarity between the two. For instance it is necessary for them both to have wires over which the transmission is to be made, and which are similarly supported; they both use batteries for the production of electric currents necessary for conveying the signals and sounds; and, they both exercise the right of eminent domain for the purpose of constructing their line of wires—along which the similarities of the two are identical, and if it were not for the fact that we could examine the terminals of the two lines, we could not distinguish one from the other. They are performing the same duties toward the public; and, while the one was not mentioned nor even contemplated at the time these statutes were enacted, yet this is no reason why the law-makers did not then intend to incorporate and comprehend therein all the improved methods which might thereafter be made for transmitting messages over telegraph lines.¹³ The telephone is but a novel method to accomplish the object for which the telegraph was used. It is the introduction of a new device, recently discovered, by means of which an improvement has been made in the transmission of sound—an improvement in the apparatus so as to change the transmission of the signals or sounds to that of the voice, by causing electrical undulations similar in form to the vibration of air accompanying the vocal sounds. It is not presumed that it was the purpose of the body of lawmakers to enact laws which should apply altogether to the operation of any business institution as it was carried on at the time of the adoption of the act.

¹² Statutes authorizing telegraph companies to exercise the right of eminent domain apply to telephone companies. *San Antonio, etc., R. Co. v. S. W. Tel., etc., Co.*, 93 Tex. 313, 56 S. W. 201, 77 Am. St. Rep. 884, 149 L. R. A. 459; *South Western Tel., etc., Co. v. Gulf, etc., R. Co.*, 52 S. W. 106; *Gulf, etc., R. Co. v. Southwestern Tel., etc., Co.*, 18 Tex. Civ. App. 500, 45 S. W. 157, also of the state authorizing telegraph

companies to occupy highways. See *Peoples Tel., etc., v. Berke, etc., Turnpike Road*, 199 Pa. St. 411; *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334; 79 N. W. 315.

¹³ "In these days there ought to be no one to question the statement that a telephone is simply an improved telegraph." *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315.

If any presumption is to be indulged in, it is that general legislative enactments are mindful of the growth and increasing needs of society, and they should be so constructed as to encourage rather than to embarrass the inventive and progressive tendency of the people.¹⁴ We live in a land of progress and advancement and as the world grows older the wiser man becomes. Inventions and improvements of a few years back and which at the time seemed to be complete in construction in every respect, have become noviated and developed beyond the greatest expectation of the inventor. This is not a new fact, not a new idea; for such has been the case since the dawn of creation and will continue until man shall have discovered and mastered the hidden and unseen mysteries of the universe, and when there will be nothing left to which he may devote his mind for the up-building of his fellow-man.

§ 7. Same continued—reasons as compared to improvements on other corporations.

The improvements, indeed the revolution, in the method of transacting the business of each of the great corporations, have never given rise to a suspicion that these additional methods for accomplishing the same purpose were inconsistent with the original powers granted to them in their constituting instruments. Railroad corporations which were created even before the invention of the telegraph, have since constructed these lines along their rights of way for purposes of convenience in carrying out the business enterprises for which they were created; and it is a settled fact that they are not an additional servitude to the roadway and one different from that for which it was acquired and for which further consideration would be necessary. Street car corporations which were created at a time when the method of propelling their vehicles was by the means of the horse power, have, since the discovery and development of the electric or motor system, adopted this ingenious means for the purpose of run-

¹⁴Hudson River Tel. Co. v. Railway Co., 135 N. Y. 393, 31 Am. St. Rep. 838, 17 L. R. A. 674.

ning their ears, without any change of the old charter.¹⁵ The purpose for which these corporations were originally created was for the convenience of public travel along and upon the streets and highways. By the adoption of this new improved method of motor power, their purposes have been changed only for the betterment of their enterprises and for convenience to the public. The same rule should and does apply to the improvements of the telegraph with respect to the newly-discovered method of transmitting intelligence by means of the telephone.

§ 8. Same continued—under statutes.

Mr. Freeman has made a very thorough discussion of this subject on the law of the telephone and it will be our pleasure to here quote what he says in regard to this particular subject: "In considering such questions as have been presented to them, the courts have almost uniformly regarded the telephone and the public and private rights and duties growing out of it as similar in character and extent to the telegraph, and the public and private rights growing out of the invention and general use. Thus, in England the term 'telegram' has been adjudged to include a conversation by means of telephone, and the telephone business to be within the statute giving to the postmaster-general the exclusive control of the transmission of messages by telegraph.¹⁶ In Iowa, telephone companies are classed with telegraph companies, for the purpose of determining the jurisdiction of the justice of the peace over them; ¹⁷ and deciding where and how they and their property shall be assessed.¹⁸ So, in discussing whether telephone corporations were entitled to use the public streets, or to exercise the right of eminent domain, and whether they were subject to legislative control for the purpose of preventing unreasonable discriminations and the imposition of exorbitant charges,

¹⁵ *Hudson River Tel. Co. v. Railway*, 135 N. Y. 393, 31 Am. St. Rep. 338; *Turnpike, etc. v. R. Co.*, 31 Am. St. Rep. 838, 17 L. R. A. 674; *Cincinnati Inclined Plane Ry. Co. v. City and Suburban Tel. Assn.*, 29 Am. St. Rep. 559, 48 Ohio St. 390, 27 N. E. 890, 12 L. R. A. 534.

¹⁶ *Atty.-Gen. v. Edison Tel. Co.*, L. R. 6, Q. B. D. 244.

¹⁷ *Franklin v. N. W. Tel.*, 69 Iowa 97, 28 N. W. 461.

¹⁸ *Iowa Union Tel. Co. v. Board of Equalization*, 67 Iowa 250, 25 N. W. 155.

the courts have generally proceeded upon the assumption that the rights, duties and obligations of such corporations are analogous to those formed for the purpose of carrying on the business of transmitting messages and news by the use of the telegraph. In Wisconsin, the statute regarding the corporations provided, among other things, that corporations might be formed, 'to build and operate telegraph lines and conduct the business of telegraphing, and to conduct and maintain their lines with all necessary appurtenances.' It was held that this statute authorized the incorporation of a telephone company.¹⁹ The statute of Pennsylvania controlling telegraphic corporations enacted that 'the said telegraphic corporation shall receive dispatches from and for other telegraph lines and corporations, and from and for individuals: and on payment of their usual charges to individuals for transmitting dispatches as established by the rates and regulations of such telegraph lines, transmit the same with impartiality and good faith, under penalty of one hundred dollars for every neglect or refusal so to do.' On an application being made to the court of common pleas of the city of Philadelphia by the commonwealth on the relation of the Baltimore and Ohio Telegraph Company for a writ of mandate to compel the Bell Telephone Company to give the relator a telephone and the necessary wires, the court determined that telephone companies were controlled by the provisions

¹⁹ The court in considering the question said: "It is urged that the power thus expressly given to form and organize corporations for the purpose of building and operating telegraph lines, or conducting the business of telegraphing in any way, includes the power of forming and organizing corporations for the purpose of building and operating telephone lines, or conducting the business of telephoning in any way. . . . In that case (Atty.-Gen. v. Edison Telephone Company) the court concluded that Edison's telephone was a telegraph within the meaning of the telegraph acts, although the telephone was not invented nor contemplated when those acts were passed. It is

thus said, in effect, that the mere fact that sound itself is transmitted by the telephone established no material distinction between telephonic and telegraphic communications, as the transmission if it takes place, is performed by a wire acted on by electricity. It is there further said that, of course, no one supposes that the legislature intended to refer specifically to telephones many years before they were invented, but it is highly probable that they would, and it seems to us also that they actually did, use language embracing further discoveries as to the use of electricity for the purpose of conveying intelligence." Wisconsin Tel. Co. v. City of Oshkosh, 62 Wis. 36, 21 N. W. 828.

of its statute, and therefore could not withhold from one person or corporation the privileges which it conceded to another.”²⁰

§ 9. Same continued—construction of statutes.

In the discussion of this subject, it will be our purpose to mention the nature of some of the different statutes of the various states which have bearing on this point at issue and how the same have been interpreted by the courts therein. It is true that this is no longer much of a controverted question as most of the states have, since the invention and development of the telephone, become so well versed in the nature, use and convenience of it, that a greater portion of the statutes therein now mention the “telephone” in connection with the “telegraph.” But there is a rule of law in the interpretation of a statute which has been amended by a material change of its language, that this fact indicates an intent to change the meaning of the statute.²¹ So, the result of the rule is that where a statute originally contained the name “telegraph” and was afterwards amended so as to mention also the name “telephone,” the law flowing therefrom was materially changed and the rights and privileges exercised by the telegraph company, under the unamended statutes could not be enjoyed by the telephone companies, if such was the intent of the legislature.²²

§ 10. Same continued—illustrated.

This question was settled in a case in Texas which arose in a suit instituted by a telephone company to condemn certain property for its right of way. There were in the general incorporation laws of this state a statute²³ which granted to telegraph companies the right to condemn property for rights of way. In another division of the original act, corporations might be formed for “the constructing and maintenance of a telegraph line,” no mention being made of the telephone. The first-mentioned statutes have remained in force since their enactment as part of the general incorporation law, but the

²⁰ Bell Tel. Co. v. Com. ex rel. Baltimore and O. T. Co., 59 Am. Rep. 172 (Penn. case).

²¹ James v. Patten, 6 N. Y. (2 Selden) 9, 55 Am. Dec. 376.

²² San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co., 93 Tex. 313, 77 Am. St. Rep. 884, 56 S. W. 201, 49 L. R. A. 459.

²³ 5 art. 698 and 699, Laws 1871.

provision for incorporating a telephone company was afterwards amended so as to read, "the construction and maintenance of a telegraph or a telephone line," which was later changed so as now to be "the construction and maintenance of a telegraph and telephone line." It will be seen that in the different changes of these statutes whereby the telephone became an important factor, to enjoy some of the rights and privileges which were and are enjoyed by the telegraph, there is nothing said, in any of these amended or unamended statutes which gives the telephone the right to exercise the power of eminent domain. The foremost and most important question in this case was whether or not the statutes that relate to the exercise of the right of eminent domain in condemnation proceedings by telegraph companies, apply to telephone companies and authorize a like procedure by the latter. The court held in this case that the phrases, "magnetic telegraph lines," and "any telegraph lines" found in a statute are broad enough to include the "telephone," which is merely another method of communication by means of electricity, and where another statute confers upon the former the right of eminent domain in condemnation proceedings, the same will apply to telephone companies.²⁴

§ 11. Same continued.

In New Jersey, the question arose as to the validity of the incorporation of a telephone company to be incorporated under the general law which authorized the organization of telegraph companies without mentioning the term "telephone" and the right to condemn property. The original act to incorporate telegraph companies had been amended similarly to the Texas statutes mentioned above, whereby and wherein the telephone was mentioned in connection with the telegraph but no changes had been made in the original statute with respect to the right to exercise the power of eminent domain. The court held in that case that the term "telegraph" as used in the statute, included "telephone," and that the charter

²⁴San Antonio, etc., R. Co. v. Southwestern Tel. Co., 93 Tex., 313, 77 Am. St. Rep. 884, 56 S. W. 201.

granted to a telephone company, under the general law authorizing the incorporation of telegraph companies, was valid.²⁵ The court said in its able opinion; "Its application to the purposes of speedy transmission of intelligence, was but a change in detail, but not in substance, of the business for which these companies were clothed with corporate privileges. They are both services of a public nature which would permit the legislature to confer the power to condemn for each use. They are both designed to convey intelligence between distant places. So far as the owner over whose land their tracks or routes lie, they each are operated with the same appliances. Poles and wires placed alike, impose exactly the same servitude upon the land. With the change in the apparatus at the termini telegraphy becomes telephony. The former makes the distant message intelligible by words, marks, or sounds; the latter by sounds alone. The same electric fluid is the medium of transmission, and all the internal structure is the same in both. The corporation employing either means of communication is executing substantially the same public function in substantially the same way. The business conducted in either way, is within the purpose for which the statute was enacted."

§ 12. Same continued.

The charter of the City of St Louis gave the mayor and the board of aldermen the power to license, tax, and regulate telegraph companies or corporations, and all other businesses, trades, avocations, or professions whatsoever. The question was settled there in a case in which a telephone company was being prosecuted for violating a certain city ordinance which attempted to regulate the charges of the company. The court held in this case that telephone companies were *ejusdem generis* with telegraph companies, though the former were not in existence at the date the charter was granted.²⁶ There are many other statutes and cases both state and federal²⁷ to which

²⁵ State v. Central New Jersey Tel. Co., 53 N. J. L. 341, 21 Atl. 460.

96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370.

²⁶ City of St. Louis v. Bell Tel. Co.,

²⁷ Cumberland Tel. Co. v. United Electric Co., 42 Fed. 273.

we could refer the reader in verifying the fact that the term "telegraph" in statutes means and includes any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals and that it is comprehensive enough to embrace the telephone,²⁸ but we deem that enough has already been said on the subject.

§ 13. Same continued—when applied.

There have been different cases in which the above question has been tested in order to ascertain the different ways in which the rule might be applied. For instance, as we said above, statutes authorizing telegraph companies to exercise the right of eminent domain or to occupy highways, apply to telephone companies. It has been held that the same rule applied to statutes forbidding discrimination; as where a statute provided that telegraph companies shall receive dispatches from and for other telegraph lines, and from and for individuals, and transmit them impartially and in good faith; under these statutes a contract made between a telephone company and the owner of the telephone instruments providing that the company in the use of the instrument shall discriminate as between telegraph companies, is void as against public policy.²⁹ The same rule applies to statutes relating to taxation;³⁰ and to those providing for the incorporation of such companies;³¹ and to statutes fixing the locality of suits against telegraph companies.³²

§ 14. When different rule obtains—intent of law-makers.

The rule that the term "telegraph" in statutes includes and embraces "telephone" is not general, but in order to determine this fact

²⁸ Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; Roberts v. West. Tel. Co., 77 Wis., 589, 46 N. W. 800.

²⁹ State v. Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583.

³⁰ Iowa Union Tel. Co. v. Board of Equalization, 67 Iowa 250, 25 N. W.

155; Com. v. West. Union Tel. Co., 2 Dauphin Co. Rep. (Pa.) 30.

³¹ Duke v. Central New Jersey Tel. Co., 53 N. J. L. 341, 21 Atl. 460; York Tel. Co. v. Kessey, 5 Pa. Dist. 366; Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 328, 21 N. 828.

³² Franklin v. Northwestern Tel. Co., 69 Iowa 67.

the minds of the law-makers must be consulted to ascertain as to whether or not it was the intent of this body that the "telephone" was comprehended in the term "telegraph." When, from the circumstances or character of the legislation, it is clear that the intention was otherwise, as in the case of the Act of Congress giving telegraph companies a right to occupy post-roads, the act does not embrace telephone companies.³³

³³ *Reckmond v. Southern Bell Tel., etc, Co.*, 174 U. S. 761, 19 S. Ct. Rep. 778.

CHAPTER II.

LEGAL STATUS OF TELEGRAPH AND TELEPHONE—AS TO PUBLIC USE.

- § 15. Right of eminent domain.
- 16. How to be exercised.
- 17. Telephone included.
- 18. Accepting right of eminent domain.
- 19. To regulate charges.
- 20. Character of property.

§ 15. Right of eminent domain.

The telegraph is such a public convenience as to entitle it to exercise the power of eminent domain in its behalf.¹ The transmission of intelligence by electricity is a business of public character to be exercised under public control in the same manner as the transportation of goods or passengers by railroads. This fact has been recognized by the acts of Congress,² and by the decisions of both the federal and state courts.³ So far as is known to us, it has not been held otherwise anywhere.⁴ The conveniences enjoyed by the public from these companies are as great as those obtained from any other quasi-public corporation. The railroad companies, with all the uses to which they may be applied in transporting goods, merchandise and other kinds of property; and, also furnishing suitable and proper accommodations, not to be equaled, for any who desire to travel, are no more convenient and acceptable to commercial business than those which furnish means for transmitting intelligence. Congress

¹ Laws of Telephones, 10 Am. St. Rep. 131.

² March 3, 1863; July 24, 1866.

³ Pensacola Tel. Co. v. West. U. Tel. Co., 96 U. S. 1.

⁴ Pierce et al. v. Drew et al., 136 Mass. 75, 57 N. E. 220, 49 Am. Rep. 7; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; West U. Tel. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692; New Orleans, etc., R. Co. v. South-

ern, etc., Tel. Co., 43 N. J. L. 381; Lackie v. Mutual Tel. Co., 103 Ill. 401; Chicago, etc., Bridge Co. v. Pac. Mut. Tel. Co., 36 Kan. 113, 12 Pac. 535; Tiffany v. U. S. Illuminating Co., 67 How. Pr. (N. Y. Super. Ct.) 73; American Tel., etc., Co. v. Pearce, 71 Md. 535, 18 Atl. 210, 23 Am. St. Rep. 227; Lewis on Em. Dom., §172; Mill on Em. Dom., §21.

early saw that they were of such public convenience and use to the government and so necessary to the progress of our commercial interests, that it deemed them sufficiently quasi-public corporations to be justified in granting them the privilege of exercising the right of eminent domain for the purpose of acquiring the right to erect and maintain their poles, wires and other necessary appliances over and upon public and private property. In furtherance of this privilege, it passed the following statute: "Any telegraph company now organized, or which may hereafter be organized under the laws of any state of the Union shall have the right to construct, maintain, and operate lines of telegraph . . . over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by act of Congress, . . . provided said lines shall not be so constructed as to interfere with travel" on such roads; and provided, also, "that, before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file its written appearance with the postmaster-general of the restrictions and obligations required by this act."⁵ Most of the states in the Union have statutes similar in nature to this. It is not our purpose to leave the impression on the reader's mind that this statute is the first instance of our government regarding the transmission of intelligence by electricity as a business of public character and to be exercised under the public control in the same manner as the transportation of goods or passengers by railroad; for they have so been considered almost as long as they have been in use. They may exercise this right in the streets, upon the public highways, along railroads, through private and public property, over navigable rivers, or anywhere else necessary to carry out the objects for which they were incorporated.

§ 16. How to be exercised.

After a telegraph company has exercised the right of eminent domain and obtained the easement or right of way on which to plant its poles and stretch its wires, it must exercise the use thereto so as not to incommode the conveniences and uses to which it is otherwise

⁵ July 24, 1866. -

put, as that of public travel. They must not erect their poles, piers, abutments, guys, or any other part of their appliances necessary for the carrying on of their business in such a manner as to be a nuisance or subject persons or property to danger therefrom.⁶ If they should, they will be liable in damages to any one who may be injured thereby, and may be forced to either remove such obstructions or abandon their business at that point. If it is not necessary for the comfort and pleasure of those living near those inconveniences, that they should be removed, the company will not be compelled to remove them;⁷ for the company may be able to carry on its business at other places where the same results would not happen;⁸ or, in a different manner, as by the means of a viaduct placed beneath the surface of the streets or highways.⁹ They will not be permitted to obstruct the ancient light with a great bunch of wires stretched over and near a window; nor can the inmates therein be compelled to be discomforted by great vibrating noises of these wires. They cannot cut trees nor limbs therefrom, to any great extent, without permission of the owner. It is very seldom that a tree could be cut, but there is no

⁶ *Wilson v. Great Southern Tel., etc. Co.*, 6 So. 781. A license from a city to erect its poles in and string its wires over the public streets carries with it an implied obligation to erect and maintain them in a safe condition, so that they will not become nuisances, or endanger the safety of the traveling public. When the wires fall into the street it is the duty of the company to remove them after reasonable notice, and it is liable for injuries resulting from its failure to do so, though their fall was occasioned by the weight of ice produced by water thrown on them by the city fire department while extinguishing a fire. *Nichols v. Minneapolis*, 33 Minn. 430, 53 Am. Rep. 56, 23 N. W. 868. Under the provision of the Ohio statutes, that a telephone company may occupy for its poles a part of the public highway, but must not thereby incommode the public, it is required to

exercise reasonable care in the locality of its poles, but is not required to so locate them as to provide against all possible injuries to travelers. *Sheffield v. Central U. Tel. Co.*, 36 Fed. 164. A court will take judicial notice that telephone poles in a highway must be set near the side thereof, generally outside of the curb or ditch line, and, therefore, necessarily in line with trees in the highway. *Wyatt v. Central Tel. Co.*, 123 Mich. 51, 81 N. W. 928, 31 Am. St. Rep. 155, 47 L. R. A. 497.

⁷ *American, etc., Tel. Co. v. Hess*, 125 N. Y. 641, 21 Am. St. Rep. 764, 13 L. R. A. 454n; *Note to Julia Building Assn. v. Bell Tel. Co.*, 51 Am. Rep. 409.

⁸ *Cincinnati Incline Plane R. Co. v. City, etc., Tel. Assn.*, 48 Ohio St. 390, 29 Am. St. Rep. 509, 12 L. R. A. 534, 27 N. E. 890.

⁹ *Id.*

reason why small undergrowth along the public highway may not be, provided the company cannot otherwise conveniently erect its poles and wires. As to limbs along such highways, they may be cut and trimmed sufficiently to permit the poles to be planted and the wires to be stretched without the consent of the owner, but as to such cutting and trimming in towns and cities the rule is different. There, the trees are considered not only as an ornament but also as a necessity for health. A tree which might be regarded as worthless on the country highway may be very valuable to an abutting street owner. It is in some states a criminal trespass for a telegraph company to trim trees on the streets without the consent of the owner, and when such is done, exemplary as well as punitive damages may be recovered.¹⁰ It is not our purpose to mislead the reader in saying that these companies can cut and trim trees or any kind of undergrowth on the lands of private parties, for this would be taking property without due compensation, but when the trees and undergrowth are of little value or nearly so, and the right of way has been acquired, they may be removed without the owner's consent. So, if a telephone company is given the right to erect its lines along a highway, it must of necessity, have the right to remove obstructions. Hence, it may in a proper manner, trim trees to obtain a free passage for its wires without first giving the abutting owner an opportunity to do such cutting, but the company must answer for any unnecessary, improper or excessive cutting.¹¹

§ 17. Telephone included.

All the law which has been heretofore commented upon applies to telephone companies, provided they are not owned by private indi-

¹⁰ *Cumberland Tel., etc., Co. v. Cassey*, 78 Miss. 666, 29 So. 762.

¹¹ *Wyant v. Central Tel. Co.*, 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497; *Memphis Bell Tel. Co. v. Hunt*, 84 Tenn. 456, 57 Am. Rep. 237, 1 S. W. 159, Monographic notes to Chesapeake, etc., Tel.

Co. v. Mackenzie, 28 Am. St. Rep. 235; *Pearce et al. v. Drew et al.*, 136 Mass. 75, 49 Am. Rep. 7; *Laws of telephone*, 10 Am. St. Rep. 139; *San Antonio, etc., R. Co. v. Southwestern Tel. Co.*, 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L. R. A. 459.

viduals.¹² A telephone corporation is, for many purposes, regarded as a common carrier; and it may, doubtless like other common carriers, be authorized to exercise the power of eminent domain for the purpose of acquiring the right to maintain its poles, wires and other necessary appliances upon and across private property. When a statute confers upon telegraph companies the right of eminent domain in condemnation proceedings, the same, as has been seen, applies to telephone companies and authorizes a like procedure.

§ 18. Accepting right of eminent domain.

Whatever may be the character of any line, the owners, by accepting privileges from the public to do certain acts—as being clothed with the right of exercising the power of eminent domain—make it such a public use as to place it under obligations to the public in the same manner as any other quasi-public corporation. Their business intimately concerns the public; and, on this account, the government assumes and has the right to regulate their business so as to insure impartiality of service and prevent the exaction of unreasonable tolls.¹³ They are under obligations to the public to have skilled operators, good machinery and serve all alike who apply to them, for the same compensation. The law requires that their contracts shall be performed in good faith; that their functions shall be discharged with reasonable care; and they shall answer in damages for losses and injuries that may be traced directly or with reasonable certainty to their negligence.¹⁴

¹² "An individual may conduct any proper business without legislative assent, unless there has been some legislative restriction upon such right." A telephone may be owned and conducted by an individual. *Magie v. Overshiner*, 50 Ind. 127, 65 Am. St. Rep. 367, 40 L. R. A. 370, 49 N. E. 959.

¹³ "They are corporations created for public benefit, endowed with special privileges such as the right of eminent domain, and perform important functions of commerce supplanting in cases where celerity and rapid transmission

of intelligence is necessary, the postal service of the government. Their business intimately concerns the public, and, on this account, the government assumes and has the right to regulate their business so as to insure impartiality of service and prevent the exaction of unreasonable tolls." *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. Rep. 613, 34 L. R. A. 492.

¹⁴ *West. U. Tel. Co. v. Allen*, 66 Miss. 549, 6 So. 461; note to *West. U. Tel. Co. v. Blanchard*, 45 Am. Rep. 486;

§ 19. To regulate charges.

A telegraph or telephone company is engaged in a business effected with a public interest within the principle which authorizes the state to regulate the charges of companies carrying on such a business. When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use and must, to the extent of that interest, submit to be controlled by the public for the common good as long as he maintains the use to which he has so devoted his property; he can only escape such public control by withdrawing his grant and discontinuing the use.¹⁵ But when a city charter gives the mayor and assembly the power "to license, tax, and regulate telegraph companies," the power to regulate these companies does not confer upon this body, the power to fix a rate of charges by an ordinance.¹⁶ The poles, wires and fixtures of any telephone company may belong to private individuals, but if they put them to a use to which the public has an interest, the public may exercise control and authority over that interest.¹⁷ It may

West. U. Tel. Co. v. Mansford, 87 Tenn. 190, 10 Am. St. Rep. 630, 2 L. R. A. 601n; West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; Pepper v. Tel. Co., 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 10 L. R. A. 660; Cutts v. West. U. Tel. Co., 71 Wis. 46, 36 N. W. 637.

¹⁵ Munn v. Illinois, 94 U. S. 113; Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; Chicago, etc., R. Co. v. Iowa, 94 U. S. 155; Chicago, etc., R. Co. v. Ashley, 94 U. S. 179; Winona, etc., R. Co. v. Blake, 94 U. S. 180; Railroad Co. v. Richmond, 96 U. S. 21; Railroad v. Fuller, 17 Wall. 560; Olcott v. Supervisors, 16 Wall. 678; Raggles v. Illinois, 108 U. S. 526; 2 S. Ct. Rep. 832; Spring Valley Water Works v. Schottles, 110 U. S. 347, 4 S. Ct. Rep. 48; Raggles v. People, 91 Ill. 256; I. C. R. Co. v. People, 108 U. S. 541, 2 S. Ct. Rep. 839; Allmit v. In-

glis, 12 E. 527; Mayor, etc., of Mobile v. Yisille, 3 Ala. 137, 36 Am. Dec. 441; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 343; Bolt v. Stenett, 8 T. R. 606; Com. v. Duane, 98 Mass. 1; Com. v. Alger, 7 Cush. 53; Metropolitan Board v. Barrie, 34 N. Y. 657; Slaughter-House Cases, 16 Wall. 36; Shorple v. Ullay, etc., 21 Pa. St. 147; Grant v. Courter, 24 Barb. 232.

¹⁶ City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 9 Am. St. Rep. 370, 2 L. R. A. 278n. A municipal corporation has only such powers as are expressly granted, and such as are necessary to carry into effect those specially conferred, and such powers are strictly construed. Note to McCord v. Pike, 2 Am. St. Rep. 92; Chicago Gas Light Co. v. Peoples' Gas Light Co., 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169.

¹⁷ Magie v. Overshiner, 150 Ind. 127, 65 Am. St. Rep. 367, 40 L. R. A. 370, 49 N. E. 950.

control the charges between points within the state; and this, too, notwithstanding the fact that the company is carrying on interstate commerce;¹⁸ or that the lines are operated under a patent granted by the federal government. The charges cannot be defeated by an attempt to divide them into two items, one as a regular rental and the other as a monthly charge for the use of instrument by non-subscribers; nor can the companies defeat the maximum charges by charging for each conversation instead of charging a regular rental.

§ 20. Character of property.

It has been held by one court,¹⁹ that the poles, wires and lamps of a telegraph company were real property; but it has been held by another court²⁰ that the wires did not change their character by being attached to poles so as to become part of the realty and become covered by a pre-existing mortgage when it was the intention of the parties to remove them after a certain time. It seems to us that when a wire is attached to poles for the purpose of conducting intelligence, that it then becomes as much the realty as the poles themselves. The question of intent hardly enters into the matter unless it is openly asserted by express agreement, since it is not presumed that the wires are constructed temporarily; when this is the case, it seems that they would be classed as fixtures and become part of the realty. The supreme court of Mississippi decided a case involving a point similar to this. In that case the plaintiff agreed to furnish an electric light plant for defendants' boat under an agreed price if the lights furnished were good, but they failed to prove satisfactory to the owners of the boat and they refused to pay for same. This suit was brought to fasten a lien on the boat for the contract price as "material furnished about the alteration or repairs" of said boat. The court held that the lights were essential to the business in which the boat was engaged, and the articles supplied were intended as a permanent part of the boat and were attached to it and were a part of it.²¹ A tele-

¹⁸ *Central U. Tel. Co. v. Falley*, 118 Ind. 194, 10 Am. St. Rep. 114, 19 N. E. 609.

¹⁹ *Keating Imp. Co. v. Marshall Elec. Light, etc., Co.*, 74 Tex. 605.

²⁰ *Boston Safe Deposit, etc., Co. v. Bankers, etc., Tel. Co.*, 36 Fed. 288.

²¹ *Mielholland v. Thompson-Houston Elec. Light Co.*, 66 Miss. 339, 6 So. 611.

graph company is an important public agency and an instrument of commerce, and is within the rule of the United States courts giving a lien superior to the mortgage lien to those who furnish labor or materials to operate a railroad or similar utility.²²

²² Receiver's certificate issued by the receiver of a telegraph company by an order of the court, and made a lien upon all the company's lines of telegraph, are a lien upon wires strung by a workman but grounded by him so as not to be usable as telegraph lines, and such lien is superior to that of the workman. *Postal Tel. Cable Co. v. Vane*, 80 Fed. 961, 26 C. C. A. 342.

CHAPTER III.

AS TO COMMON CARRIERS.

- § 21. Scope of chapter.
- 22. Common-law theories.
- 23. Same continued—decision criticised.
- 24. Common-law theory continued—distinction between these and common carriers—reasons.
- 25. Common-law theory continued—analogy to common carriers of goods.
- 26. Common-law theory continued—degree of care.
- 27. Common-law theory continued—bailees for hire—analogy.
- 28. Common-law theory continued—quasi-common carrier of news.
- 29. Common carriers continued—law applicable to both telegraph and telephone companies.
- 30. Statutory theory.
- 31. Common carriers in absence of statute are not—reason.
- 32. Reasonableness of statutes—making them common carriers.
- 33. Statutes superior to any agreement.
- 34. Beyond the limit of the state.
- 35. Substantial compliance with form of message.
- 36. Prima facie negligence.
- 37. Cannot exempt themselves by contract.
- 38. Public servants must serve the public impartially and in good faith.
- 39. Exception to rule.
- 40. Duty to forward message in order of time received.
- 41. Should not disclose the message.

§ 21. Scope of chapter.

Many theories have been advanced as to the legal status of telegraph and telephone companies, and as to their analogy to common carriers in order to determine whether or not they were insurers of correct transmission of intelligence; and whether they must accommodate all, impartially, who apply to them to perform such duties as fall within the scope of their work after making or offering to make compensation for said services. In considering this subject, we shall discuss: first, whether or not they are insurers of an accurate and correct transmission of messages; and, second, whether or not they must serve all alike who apply to them after offering to comply with

their reasonable regulations. And under the first of the above division of the subject—whether or not they are insurers of correct transmission of intelligence—we shall first discuss the common-law theory and then the statutory.

§ 22. Common-law theories.

The weight of authority is almost unanimous that telegraph and telephone companies, under the common law, are not common carriers and therefore insurers of a correct transmission of messages. There are a few opinions holding differently to the general rule,¹ but they were decided at a time when there were few decisions on the subject, and when the same attention and thought was not devoted to the matter as was afterwards given to it. In one of the earliest courts of our country, of which we have any knowledge, holding them to be common carriers, the presiding judge said: "The rules of law which govern the liabilities of telegraph companies are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligations of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of contract in one case or the other is or may be attended with the same consequences; and the obligations to perform the stipulated duty is

¹ The leading case in support of this view is that of *Parker v. Alta, etc.*, Tel. Co. 13 Cal. 422, 73 Am. Dec., 589, decided in 1859. See also *McAndrew v. Electric Tel. Co.*, 170, C. B. 3, 84 E. C. L. 3; *West, U. Tel. Co. v. Meek*, 49 Ind. 53; *Bowen v. Lake Erie Tel. Co.*, 1 Am. L. Reg. 685; *West, U. Tel. Co. v. Fontaine*, 58 Ga. 433; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Bell v. Dominion Tel. Co.*, 25 L. C. J. 248; *Bryant v. Am.*

Tel. Co., 1 Daly (N. Y.) 575; *West U. Tel. Co. v. Buchanan*, 35 Ind. 440; *Manville v. West, U. Tel. Co.*, 37 Iowa 218, 11 Am. Rep. 12. The rule established in California by the *Park's* case has been changed by special statutory provisions, and the authority of the other cases is weakened by the fact that in most of them what was said about such companies being insurers was unnecessary to the decision of the case.

the same in both cases, the importance of discharge of it in both respects is the same. In both cases the contract is binding, and the responsibility of the parties for the breach of duty is governed by the same general rules."² There was only one English case decided before the above, which, only by implication, can be said to be authority for holding them to the liability of insurers.³

§ 23. Same continued—decision criticised.

Some weight might have been attached to the case above quoted, had it been decided at a time when the facilities for transmitting intelligence by means of electricity had been developed to its present state, when messages can be sent without so much risk of incorrect transmission. This state of perfection is now almost complete. As was very ably said by Judge Bruce, while discussing the perfection to which the science of telegraphy had attained: "In the ordinary course of business, the newspapers inform us, and we have no reason to doubt the truth of the statement, telegrams are sent from New York to London, and answers received, in about thirty-three minutes, they having passed through thirty-six different hands, and traveled over seven thousand miles. This is done every day, such is the perfection to which the art is brought. Does an instrumentality which can perform such feats require the fostering care of courts? Is it an infant yet in its swaddling clothes? No, but a giant power, under the control of man, whose daily exploits, guided by care and skill, throw those of the fabled Mercury deep into the shade and far in the rear."⁴ With the skilled operator and the improved machinery which we now have, it is almost impossible, without the company's negligence, to fail in transmitting messages correctly. But during the time of this decision, the science of telegraphy was not perfect by any means. The scientist had not learned how to guard against the atmospheric disturbances; the apparatuses necessary to transmit in-

² *Parks v. Alta etc. Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589.

³ *MacAndrews v. Electric Tel. Co.*, 17 Com. B. 84, Eng. Com. L. 3, decided in England in 1855. This case by implication, only can be said to be authority of insurers. This case was followed by

the *Park's* case, the only case to be found in which telegraph companies have been expressly held to be common carriers, and subject to the same severe rule of responsibility.

⁴ *West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 281.

telligence were crude and imperfect and the operators were very unskilled in the management of the machines. Why this learned judge could say under these circumstances that they were insurers of correct transmission of intelligence is to be answered by saying that his reasons on this subject were similar to the science of telegraphy at that time—very imperfect. There is no doubt but that this court was somewhat misled by the English case cited.

§ 24. Common-law theory continued—distinction between these and common carriers—reasons.

The telegraph and telephone companies are not common carriers and so insurers of a correct transmission of messages, yet they are liable for failure to exercise due care in making such transmissions. The public is interested in them and must control the way in which they carry on their business to the extent of seeing that the confidence reposed in them by the public is exercised impartially with the same care and diligence which any one would use under like circumstances. While they are not common carriers, in the strict sense of the term, they are engaged in a business, almost if not quite, as important to the public as that of carriers.⁵ Messages which are transmitted by means of electricity are sometimes as valuable to the sender as the goods which he transports by the common carrier, but the chances which the latter has over the former in caring for the goods during transit are far superior to that of the former in controlling the messages. The common carrier has an opportunity of seeing what happens to the goods in his charge at the moment it happens. But a telegraph company, owing to innumerable causes, which may disturb the security of the lines, would be as often open to liability because of the acts of providence, unknown to it, as for any other reason. The common carrier has the tangible property and is more capable of insuring its protection while in its care than the telegraph and telephone companies have of insuring the safety and correctness of the intangible property of a message which is being transmitted over their wires and almost constantly coming in contact with atmospheric

⁵ *Hockett v. State*, 105 Ind. 250, 5 N. Tel. Co. v. Pendleton, 95 Ind. 12, 48 E. 178, 55 Am. Rep. 201; *West. U. Am. Rep.* 692.

hindrances.⁶ For this reason, the common law does not hold the telegraph companies to the same strictness of insurers over the correct transmission of messages which it places on common carriers over the goods intrusted to the latter's care. The one is liable only when it fails to exercise due care, or when it becomes negligent; while the other is always liable for the loss of all or any part of the goods, unless the same has been caused by act of the parties, of the public enemy, or by the act of God.

§ 25. Common-law theory continued—analogy to common carriers of goods.

The true rule is that the status of telegraph companies is analogous to common carriers in their obligations to serve the public in good faith and impartially.⁷ But they are not insurers of a correct transmission of messages turned over to them, as carriers are for property intrusted to them for carriage.⁸ This, then, is the analogy be-

⁶ The liability of a telegraph company for error or failure in the transmission of a dispatch is quite unlike that of a common carrier. A telegraph company is intrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but it is to be transmitted or repeated by electricity and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which cannot be estimated except by the sender, nor ordinarily disclosed by him without danger of defeating his own purpose; which may be wholly valueless if not forwarded immediately; for the transmission of which there must be a simple rate of compensation; and the measure of damages, which has no relation to any value which can be put on the message itself. *Grinwell v. West. U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485.

⁷ *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917,

4 L. R. A. 611n; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715.

⁸ "The current of authority is not in this direction, and properly so, because the transmission of messages is necessarily subject to the risk of mistake and interruption. The same is exposed to the interference of strangers; a surcharge of electricity in the atmosphere, or a failure of or, an irregularity in the electrical current, may stop communication; and it is continually subject to dangers from accident, malice and climatic influence when the company has not the immediate custody of the messages as the common carrier has of the merchandise it carries; and it should not, therefore, like a common carrier, be treated not only as a bailee but as an insurer." *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126. See also *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; *Hart v. West. U. Tel. Co.*, 66 Cal. 579, 59 Am. Rep. 119, 6 Pac. 637 (rule changed by civil

tween common carriers of goods and telegraph companies. The one is an insurer of goods intrusted to it under all circumstances, except such losses as may be caused by the act of God or the public enemy; while the telegraph companies, in the absence of a contract or regulations modifying their liability, do not insure absolutely the safe and accurate transmission of messages, but are only required to exercise due care and diligence in all their work, and will be liable only for the negligence of their agents.⁹ It seems to us that the analogy between common carriers of passengers for hire and telegraph companies is stronger than that between the latter and common carriers of goods.¹⁰ Carriers of passengers are not insurers of the safety of their passengers; nor are they liable for injuries to their

code, §§2162, 2168); West. U. Tel. Co. v. Hyer, 22 Fla. 637, 1 Am. St. Rep. 222, 1 So. 129; Cen. U. Tel. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; Sweatland v. Illinois, etc. Tel. Co., 27 Iowa 458, 1 Am. Rep. 285; Aiken v. West. U. Tel. Co., 69 Iowa 31, 28 N. W. 419, 58 Am. Rep. 210; Comp v. West. U. Tel. Co., 1 Mete. (Ky.) 164, 71 Am. Dec. 461; Fowles v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 471; Birney v. New York, etc. Tel. Co., 18 Md. 341, 81 Am. Dec. 607; Grimwell v. West. U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; West. U. Tel. Co. v. Carew, 15 Mich. 525; Wane v. West. U. Tel. Co., 37 Me. 472, 90 Am. Dec. 395; Leonard v. New York, etc. Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; DeRutte v. New York, etc. Tel. Co., 1 Daly (N. Y.) 547, 30 How. Pr. (N. Y.) 403; Schwartz v. Atlantic, etc. Tel. Co., 18 Hun. (N. Y.) 157; West. U. Tel. Co. v. Griswold, 37 Ohio St. 310, 41 Am. Rep. 500; New York, etc. Print Co. v. Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338; Passmore v. West. U. Tel. Co., 78 Pa. St. 238; Aiken v. West.

U. Tel. Co., 5 S. Car. 358; West. U. Tel. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589; West. U. Tel. Co. v. Edsall, 63 Texas 668; Washington, etc., Tel. Co. v. Hobson, 15 Grett (Va.) 122; Hibbard v. West. U. Tel. Co., 33 Wis. 471, 17 Am. Rep. 452; Abraham v. West. U. Tel. Co., 23 Fed. 315, 11 Sawyer (U. S.) 28; Southern Ex. Co. v. Caldwell, 2 Wall. (U. S.) 269; Baxter v. Dominion Tel. Co., 37 W. C. Q. B. 470. See also Gray on Telegraphs, §8; Thompson on Electricity, §138; Ellis v. Am. Tel. Co., 13 Allen (Mass.) 232.

⁹ Fowler v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

¹⁰ It was said on this subject, that: "Although there may be no analogy between the business of telegraph companies and that of public carriers of passengers, for hire, yet we regard their legal statutes as practically the same. Both are engaged in a business of a public nature. Both serve all who come. Neither are insurers, or liable as such, but both are liable for negligence." Gillis v. West. U. Tel. Co., 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917; Fowler v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; Gray on Telegraph, §11, note.

passengers resulting from such defects in their buildings or means of transportation as could not have been guarded against by the exercise of care on their part; nor for injuries caused by an act of God, without negligence on the carrier's part. But when the carrier has been in any respect negligent, the concurrence of an act of God in causing the injury will not relieve the carrier from responsibility. Nor are carriers to be held liable for injuries caused without fault on their part by an act of the public enemy; nor to injuries caused by inevitable accident, not due in any way to negligence on the part of the carrier and such as no human foresight on his part could avert. The same rule applies to telegraph companies. They are both engaged in a business of a public nature, both must serve all who come—neither are insurers nor liable as such, but both are liable for negligence.¹¹

§ 26. Common-law theory continued—degree of care.

As telegraph companies are liable only for failure to exercise due care in transmitting intelligence, it might be proper to examine the true meaning of the phrase "due care;" and in doing so it gives us very much pleasure to refer the reader to the very learned and able opinion of Judge Danforth on this question, when he said, that: "To require a degree of care and skill commensurate with the importance of the trust reposed is in accordance with the principles of law applicable to all undertakings of whatever kind, whether professional, mechanical, or that of common labor. There is no reason why the business of sending messages by telegraph should be made an exception to the general rule. This requires skill as well as care. If the work is difficult, greater skill is required. It is often necessary to intrust to this mode of communication, matters of great moment, and therefore the law requires great care. It is necessary to use instruments of a somewhat delicate nature and accurate adjustment, and therefore they must be so made as to be reasonably sufficient for the purpose. The company holding itself out to the public as ready and willing to transmit messages by this means, pledges to

¹¹West. U. Tel. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 722.

that public the use of instruments proper for the purpose, and that degree of skill and care adequate to accomplish the object proposed. In case of failure in any of these respects the company would undoubtedly be liable for the damage resulting. This would not impose any liability for the want of skill or knowledge not reasonably attainable in the present state of the art, nor for errors resulting from the peculiar and unknown condition of the atmosphere or any agency from whatever source, which the degree of skill and care spoken of is insufficient to guard against or avoid."¹²

§ 27. Common-law theory continued—bailees for hire—analogy.

There are some few cases which have assigned telegraph companies to the category of bailees for hire.¹³ The argument is that as the ground of their liability is the same as that of bailees, the legal status of the two must be the same. But this doctrine is justly criticised, because telegraph companies are engaged in a business of a public nature and are precluded by rights and duties incident thereto from occupying the legal status of an ordinary bailee for hire, whose rights and duties arise wholly from the contract of employment.¹⁴ A bailee for hire is any one who has the absolute right to contract with any one with whom he may see fit and to be controlled by the contract made with such party.¹⁵ The compensation under the contract of bailment for hire may not be the same at all times, nor the same made with all persons. The bailor is not a public servant nor controlled by the public. While on the other hand, telegraph companies are engaged

¹² *Bartwell v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 447.

¹³ *Berney v. New York, etc., Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *Smithson v. U. S. Tel. Co.*, 29 Md. 162; *Pinckney v. West. U. Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765; *West. U. Tel. Co. v. Fontaine*, 58 Ga. 433.

¹⁴ *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480.

¹⁵ *White v. Phelps*, 14 Minn. 27, 100 Am. Dec. 190; *Butler v. Greene*, 49

Neb. 280, 68 N. W. 496; *Harris v. Howard*, 56 Vt. 695; *Walker v. York, etc., R. Co.*, 2 C. L. R. 237, 2 E. & B. 750, 18 Jur. 143, 23 L. J. Q. B. 73, 2 Wkly. Rep. 11, 75 E. C. L. 750; *Van Toll v. Southeastern R. Co.*, 12 C. B. N. S. 75, 8 Jur. N. S. 1213, 31 L. J. C. P. 241, 6 L. T. Rep. N. S. 244, 10 Wkly. Rep. 578, 104 E. C. L. 75. A special contract prevails against general principles of law applicable in the absence of express agreements. *Butler v. Greene*, above cited.

in a business of a public nature and must serve all who apply to them after the former have complied with their reasonable rules and regulations. They are controlled by the public and are liable to the sender of the message on account of any special contract which may have been made with him but are only liable for negligence or undue care in transmitting the message.

§ 28. Common-law theory continued—quasi-common carrier of news.

There is a late decision holding that telegraph and telephone companies are quasi-common carriers of news and, as such, bound to supply all, who are in like circumstances, alike with similar facilities, under reasonable limitations and without any discrimination.¹⁶ In our opinion this is the closest relation they have to common carriers, and in this they are not, strictly speaking, common carriers in that they are not insurers; but the care required of them in the transmission of news becomes more closely guarded. As time advances, improvements on electrical transmission of news are being rapidly made. We are approaching perfection in the art of telegraphy as the days pass, and it will only be a short time until the facilities for transmitting news will be even better and safer than for the transportation of goods by common carrier.¹⁷ When this time comes—if it should ever—there is no reason why the same stringent laws which are applicable to common carriers should not be applied with equal force and in every particular to these companies; and when they are, of course they will then fall under the head of common carriers. The constitution and statutes of some of the states are now declaring them

¹⁶ *State v. Citizen's Tel. Co.*, 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

¹⁷ Judge Bruce very ably said: "The undertaking of the company is *prima facie*, to send it correctly, and if their wires and instruments are in proper order and their operators skillful and careful, it will traverse the wires precisely in the words and figures which composed it when placed upon the wire and is sure in that shape and form to

reach its destination, no atmospheric causes intervening to prevent. The very fact that but for cases of negligence have been brought against these companies is strong proof they do, in almost all cases, transmit messages correctly, and they can always do it, if they take proper care to have requisite skill and use proper instruments." *West. U. Tel. Co. v. Tyler*, 71 Ill. 168, 24 Am. Rep. 280.

common carriers, but if such improvements are made on them as mentioned above, it will not be necessary for such laws to be enacted by the states, for they will be considered as common carriers without such laws. We do not desire the readers to understand us as saying that they are common carriers, or ever will be, in the absence of a statute declaring them to be such; but we do say that if the improvements in the methods of transmitting intelligence continues to develop for the next thirty years as they have during the last ten, they will be at such a state of perfection as will induce the courts to throw around them the same stringent and rigid rules in the enforcement of that degree of care in the transmission of intelligence as are now applicable to common carriers, thereby causing them to be insurers to a certain degree and therefore making them nothing less than common carriers.

§ 29. Common carriers continued—law applicable to both telegraph and telephone companies.

The same law which has been discussed in regard to common carriers, is equally applicable to both telegraph and telephone companies. The fact that different means are used in the transmission of intelligence over telegraph and telephone companies, does not make them different in nature. In both instances, the intelligence or message is actually transmitted by the use of agencies and instrumentalities furnished either by the telegraph or the telephone company, for which they are entitled to receive proper compensation; and one is just as much engaged in the business of transmitting intelligence for hire as the other. Both are devices by which one person is enabled to communicate with another beyond the reach of the human voice, unaided by some artificial appliance; and although, there are some differences in the mode of transmitting intelligence, yet the end sought and attained by each is substantially the same.¹⁸ The rule is not changed by reason of the fact that the agent of one company occupies a position in which he may more often be apprised of the contents of the message than the agent for the other; for in either case,

¹⁸ *State v. Citizen's Tel. Co.*, 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870.

the agents may be, and are very often, deprived of a means of ascertaining the contents of a message.¹⁹

§ 30. Statutory theory.

Having discussed at some length the analogy of telegraph and telephone companies to common carriers, as considered under the common law, it shall now be our purpose to say something of the changes which the statutes of some of the states have made with respect to this subject; and in doing so, we shall endeavor to make the discussion more brief than under the former head, or the common law theory. In fact the most that is said under this title is the result of such thoughts as may be advanced by the writer, on account of the statutory changes of the common law theory being mostly of recent enactment, and, for which reason, few cases, in which the question is considered, are found in the reports. It is held by almost a unanimity of decisions, that telegraph and telephone companies are common carriers and liable as such only under statutes in which they are so declared. And it is a pleasure to note the fact that most of the states have, or are enacting statutes which declare them common carriers; and yet, we could not have made this statement several years ago when the science of telegraphy was in its infancy, but after these many years of improvement and development of the art, we feel prone to change with the times and conditions respecting same.²⁰ While the general rule, practiced by the courts of our country in passing on issues of law presented to them for their consideration, is, that they are to be controlled to a great extent by former decisions, customs and usages; yet we do not feel constrained to follow this rule in every particular. However, it is very unsafe and improper to depart from these old usages whenever the time to do so will not permit, but in an era of progress, as we now live in, there must be changes in these laws to meet the needs and conditions of the times, and yet this is seldom done, except by legislation. A law, either common or statutory, which was sufficient to meet all the demands of a good government twenty, or may be not so many years since, may

¹⁹ *State v. Citizen's Tel. Co.*, above cited.

²⁰ *West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279.

be wholly inadequate for the general welfare of society now and should therefore be changed accordingly. There has been such an improvement in the method of transmitting messages by electricity that the common-law theory with respect to the legal status of telegraph companies should be amended by statutory laws. They have become as equally important to the commercial interest of the world as that of any common carrier of goods. They are agents of the government and have the power of exercising the right of eminent domain, without which, they could not invade the private property of an individual without his consent. With all these privileges granted by the government, and the almost perfect control over the art of telegraphy by the late and modern improvements, it is but fair and just that they be placed under almost if not the same restrictions as that which the common law imposes on common carriers.

§ 31. Common carriers in absence of statute are not—reason.

Telegraph and telephone companies are not common carriers in the absence of statutes making them such.²¹ And yet, there seems to be a misunderstanding among a few of the courts on this subject, and this, too, in the absence of statutes. These courts fail to see that in order to be liable as common carriers, they must be insurers of a correct transmission of messages as well as to serve all impartially who apply to them. If it were not necessary under the common law for them to be insurers of a correct transmission in order to be liable as common carriers, then, as a matter of fact, it would not be necessary for statutes to be enacted declaring them common carriers; for it is held by the common law that they are so much like common carriers as that they must serve the public in good faith and impartially. They are insurers of a correct transmission of messages only when they fail to exercise due care in the transmission, and in order to

²¹ *Birkett v. West. U. Tel. Co.*, 103 Mich. 361, 61 N. W. 645, 50 Am. St. Rep. 374, 33 L. R. A. 404; *Kiley v. West. U. Tel. Co.*, 109 N. Y. 231; *Redpath v. West. U. Tel. Co.*, 112 Mass. 71, 17 Am. Rep. 69; *Clement v. West. U. Tel. Co.*, 137 Mass. 463; *Becker v. West. U. Tel. Co.*, 11 Neb. 87, 7 N. W.

868, 38 Am. Rep. 356; *Lassier v. West. U. Tel. Co.*, 89 N. C. 334; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Hart v. West. U. Tel. Co.*, 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119; *West. U. Tel. Co. v. Hearue*, 77 Tex. 83.

make them absolutely and unconditionally liable for any incorrectness in the sending of the messages, except when prevented by the act of God or the public enemy, it must be done by statutory enactments.

§ 32. Reasonableness of statutes—making them common carriers.

Many of the most important business transactions of the world depend for their successful consummation upon the accuracy with which telegraph companies transmit the messages received by them. Often the messages are of the utmost importance to either the sender or addressee, and a failure to make an accurate and correct transmission of these would cause them very great damage. Public policy, the protection of the property rights of the public, the safety of the people with whom they carry on business, all require a degree of care commensurate with the magnitude of the public interest involved. Therefore, a clear and definite understanding of these companies' liabilities should be known by the public and not subject those with whom they deal to be forever and eternally troubled, harassed and annoyed by conditions, stipulations and limitations of liability made by such companies and forced upon the public. There is no more reason why an individual should be bound by the laws of the state than telegraph companies. If the passage of such laws have the effect to make the individual a better citizen and prevent him from committing wrongs; or, in other words, if they induce him to be more careful and particular in his business transactions with his fellowman, the same reason should apply to laws pertaining to telegraph and telephone companies. If a telegraph company knows that it will be liable absolutely and unconditionally to its patrons for a failure to make a correct transmission of all the messages delivered to it for transmission, the company will be much more careful and particular in looking after its business, than it would if it could limit by stipulation its own liability. Such statutes bring about better service to the public and for this reason the public receives a more valuable consideration in return for the many rights and privileges granted the company, and which are not enjoyed by the individuals, thereby making them more equitable both to the public and to the company.²²

²² West, U. Tel. Co. v. Kemp, 44 Neb. 194, 62 N. W. 451, 48 Am. St. Rep. 723.

§ 33. Statutes superior to any agreement.

These statutes are superior to any agreement made by a telegraph company. They enter into and become a part of the agreement made between the company and its patrons, and none of these agreements can be made so as to be in conflict with them; otherwise they will be void. The telegraph companies are bound by the laws of the state as much as any inhabitant thereof, and these statutes, therefore, always become a part of the contract made with the patron for the transmission of messages. That is, the telegraph company cannot ignore the law and set itself up as having superior power to the states to make laws, but must obey the latter and transmit messages in accordance with such law or be liable for its failure in that respect.²³

§ 34. Beyond the limit of the state.

A statutory provision that "any telegraph company is hereby declared to be liable for the non-delivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ; . . . and any such telegraph company shall not be exempted from any such liability by reason of any clause, conditions, or agreement contained in its printed blanks," is equitable, fair, and obligatory on all telegraph companies doing business in the state, and applies to such companies when contracting to correctly send a message to another state.²⁴ They are not penal statutes and thereby not binding on the company beyond the state. They are a part of the contract of sending and a failure to transmit correctly to its destination, which may be within another state, is a breach thereof and the party injured thereby becomes entitled to all damages actually flowing therefrom, or such as was presumed to have been contemplated at the time the contract was made, as a result of such breach.²⁵

²³ *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1084, 26 Am. St. Rep. 363.

²⁴ *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1084, 26 Am. St. Rep. 363.

²⁵ *Kemp v. West. U. Tel. Co.*, cited in note 24, 29. The court in this case,

said: "The contract was made at Pappillon within this state and the defendant undertook to transmit correctly the message to Kansas City. It did not do so. The contract of the defendant, therefore, was broken, and the plaintiff thereby sustained damages. The place where part of the service

§ 35. Substantial compliance with form of message.

These statutes do not mean, when declaring telegraph companies to be common carriers that the messages must be transmitted in the exact words of the message received by the company, but a substantial compliance with the words and language is all that is necessary, provided the substance of the message has been transmitted, and no harm has been done. No better reason for such a rule can be given than that of Judge Campbell who said: "Can it be supposed that for changing my signature or address from Campbell to Camel, or Campel, or Cambelle or Cowmel, according to the form of writing which is sometimes met with, in a message sent by me or to me, and promptly delivered, and accomplishing the purpose, and doing no harm, the penalty would be incurred? To so hold would impute to the legislature a spirit of injustice and cruelty that would seriously reflect on its attempt to legislate in this matter for the public interest."²⁶

§ 36. Prima facie negligence.

Where a telegraph company fails to transmit a message correctly, it is prima facie evidence of the company's negligence. So, in an action brought to recover damages for the erroneous transmission of a telegraphic message, proof by the plaintiff of the contract, which may be implied by the delivery of the message to be transmitted, and its acceptance by the defendant's agent, and of the breach, makes out a prima facie case; and the plaintiff need not go further and show any negligence or omission of the defendant.²⁷ If the failure was not

was to be performed can make no difference; the contract was made here, and was to be in part performed in this state, and the defendant is liable for the breach thereof.

²⁶ West. U. Tel. Co. v. Clark, 14 So. 452. The court further said: "If the message transmitted and delivered must be a reproduction *verbatim et literatim et punctuatim*, of that written to be sent or the penalty denounced by the section may be recovered, the statute is needlessly severe. No interest requires such nicety, and it may be

justly assumed that the legislature had in view not only "reasonable time" for delivery, but reasonable conformity to the terms of the message so as to present it to the sendee in such time as to effect the purpose for which it is sent."

²⁷ Pearson v. West. U. Tel. Co., 124 New York 256, 21 Am. St. Rep. 662; West. U. Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649; Reed v. West. U. Tel. Co., 135 Mo. 661, 58 Am. St. Rep. 609, 34 L. R. A. 492; West. U. Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Tyler v. West. U. Tel. Co.,

the result of negligence the means of showing that fact is almost invariably within the exclusive possession of the company. To require the sender to prove the negligence, after showing the mistake, would be to require in many cases an impossibility, not infrequently resulting in enabling the company to evade a just liability.²⁸

§ 37. Cannot exempt themselves by contract.

Telegraph companies are—and that, too, in the absence of a statute—so far common carriers that they cannot exempt themselves from liability for the consequences of their own negligence or that of their servants by a contract made between them and the sender. Telegraph companies, though not common carriers, are engaged in a business that is, in its nature, almost, if not quite, as important to the public as that of carriers. Like common carriers, they cannot contract with their employers for an exemption from liability for the consequence of their own negligence.²⁹

§ 38. Public servants must serve the public impartially and in good faith.

Telegraph companies are not common carriers, in the absence of statutes, in that they are not insurers of correct transmission of messages, but they are common carriers to the extent that they must serve all alike who apply to them for services which falls within the scope

60 Ill. 421, 14 Am. Rep. 38; *Smith v. West. U. Tel. Co.*, 57 Mo. App. 259; *Telegraph Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *Fowler v. West. U. Tel. Co.*, 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

²⁸ *West. U. Tel. Co. v. Short*, 53 Ark. 434.

²⁹ *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 269; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Pepper v. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; *Gillis v. West. U. Tel.*

Co., 61 Vt. 461, 17 Atl. 776, 15 Am. St. Rep. 917; *Brown v. Postal Tel. Co.*, 111 N. Car. 187, 16 S. E. 179, 17 L. R. A. 648, 32 Am. St. Rep. 793; *Pacific Tel. Co. v. Underwood*, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490; *Staney v. West. U. Tel. Co.*, 92 Ga. 613, 18 S. E. 1018, 44 Am. St. Rep. 95; *West. U. Tel. Co. v. Linn*, 87 Tex. 7, 47 Am. St. Rep. 58; *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 36 L. R. A. 711, 66 Am. St. Rep. 361; *Barnes v. West. U. Tel. Co.*, 24 Nev. 125, 77 Am. St. Rep. 791, 50 Pac. 438.

of their business.³⁰ Whenever they so hold themselves out to the people, after having obtained the power of exercising the right of eminent domain, they then become public servants to be controlled by the public. The public, means the people, no one of whose privileges are greater or whose favors are more acceptable than any other citizen. They must be served as one people, and in the same manner by all who place themselves before the public as public servants. Whenever they are applied to by any one to perform a duty which falls within their corporate powers, the same must be done punctually, impartially and in good faith. It is a duty they owe to the public—to the people—which any servant owes to his master, and they must look to the public as if it were one master. "For one of these companies not to receive or not to transmit and deliver a dispatch when it ought to do so, is more than a refusal to contract or than the breach of a contract; it is a wrong as pronounced as would be that of a person who should forcibly exclude another from the telegraph office, and prevent him from handing in a dispatch which he desired to lodge for transmission."³¹

§ 39. Exception to rule.

There are conditions and exceptions to this rule as is generally the case. For instance, these companies must first be compensated or an offer made to compensate them for sending the message. They must serve all impartially who apply, but they cannot be compelled to do

³⁰ *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *State v. Bell Tel. Co.*, 10 Cent. L. J. 438, 11 Cent. L. J. 359, 22 Alb. L. J. 364; *State v. Bell Tel. Co.*, 23 Fed. 539, also reported in note to 59 Am. St. Rep. 172. It was said on this point: "It is now perfectly well settled, by the great weight of judicial authority, that although telegraph companies are engaged in what may appropriately be termed a public employment, and are, therefore, bound to transmit, for all persons, messages presented to them for that purpose, they are not common

carriers in the strict sense of the term." *Fowler v. West. U. Tel. Co.*, 6 Am. St. Rep. 213; *Inter Ocean Pub. Co. v. Ass'd Press*, 184 Ill. 438, 48 L. R. A. 568, 56 N. E. 852. They have no right to discriminate between persons and corporations, and courts will interpose by writs of mandate in favor of persons to whom the use of the telephone is denied. *Central U. Tel. Co. v. Falley*, 10 Am. St. Rep. 131.

³¹ *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 27 Am. St. Rep. 260, 14 L. R. A. 95.

so until they are paid or an offer is made to pay for their services; yet these charges must be the same to all since they are regulated by the government. They should be presented within office or legal hours; as a telegraph company would not be compelled to receive and transmit a telegram after nighttime, if it were not the rule for it to do so: neither are they under obligations to transmit news on Sunday, where such it not the custom. There are some statutes which limit the kind of messages to be transmitted; to enforce these, penalties are imposed on the violators of such statutes. They need not transmit messages in regard to market reports; nor need they furnish "bucket-shops" with market quotations. Again, a telegraph company could not be compelled to receive for transmission a message which was open to the charge of indecency or profanity, and perhaps other vices, or expressed in language which might condemn it; but unless the tone or expression was such as would subject the company or any of its servants to an indictment or a civil action, they would be in duty bound to accept and transmit the message.³² They are not to consider the subject-matter, unless it shows on its face that the company would be liable to a criminal prosecution or subject itself to an action in tort; for there are many messages, such as cipher telegrams, which are not understood by the company, and to require them to stop to consider the subject-matter of every message would work a hardship not only on themselves, but also on the public.³³

§ 40. Duty to forward message in order of time received.

It is the duty of a telegraph company to forward messages in the order of time in which they are received, unless the company is under obligations, by statute or public policy, to give precedent to certain messages, as those of a governmental nature or such as are of great importance.³⁴ It is an obligation they owe to the public, to treat each and every one who applies to them in good faith and impartially,

³² Each of these conditions are fuller treated in other parts of this work and for this reason, we have not cited references.

³³ *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495.

³⁴ *Davis v. West. U. Tel. Co.*, 1 Cen. Sup. Ct. 100; *Mackay v. West. U. Tel. Co.*, 16 Nev. 222; *Allen Tel. Cases* 563; *West. U. Tel. Co. v. Ward*, 23 Ind. 377, 85 Am. Dec. 462.

and should they delay the transmission of a telegram in favor of one later received, favoritism and impartiality would be shown, which might cause serious injury to the sender, to whom they would be liable. The general rule of law that as to all valid contracts the first in time have precedence over those afterwards made, governs contracts made with telegraph companies for transmitting messages; therefore, it is the duty of the company to carry out its part of the contract by sending messages in the order of time in which the contracts are made or, in other words, in the order of time in which they are received. There are exceptions to this rule where the company is under obligations, either by statute or public policy, to give precedence to other messages. Governmental messages have precedence over private telegrams. These concern the whole people, and if they were not entitled to a preference over private messages, more serious and greater harm would, very probably, be inflicted than if they did not have these privileges; and yet, there might be instances when private messages would be of such great importance, as would entitle them to almost, if not, an equal privilege as that given in governmental messages. If the operator knows that the message should be sent immediately, or great bodily harm would be done, it then becomes of such great importance as would give it precedence. There are statutes in some states which give private messages precedence over others, where its mission is in regard to serious illness or death; but the general rule is that they must be forwarded in the order of time in which they are received. The legislature may require the company to give precedence to such messages as are sent out by the officers of the government, and in the absence of this, public policy might demand this right. The agent of the company should judge the character of the person who presents himself as an officer of the government and the nature of the subject-matter before giving the message preference, and this cannot always be correctly done; the agent labors under the same disadvantage in determining the importance of a private message, and for this reason the rule should be closely adhered to.

§ 41. Should not disclose the message.

It is the duty of a telegraph or telephone company to abstain from disclosing or using the contents of a message which it receives for

transmission.³⁵ It is as much a public duty for these companies to preserve the secrecy of the contents of messages delivered to them for transmission as it is to serve the public impartially; and if they are guilty of a willful breach of such duty, they will be liable for all damages arising therefrom. There are statutes in some states which impose a penalty on these companies and those to whom messages are intrusted for transmission, for using or suffering to be used, or willfully divulging, the contents of same. It is generally held by the courts that in the absence of such statutes, they are only liable for a breach of contract, if for anything.³⁶ It is held by the courts that a telegram is not a privilege communication and no statute in either of the states of the United States has made them so.³⁷ Neither is the telegraph companies operated by the government so that the telegrams may have the same protection as is given messages through the mail. As was ably observed by Judge Henry, while discussing this point: "Telegraph lines are not operated by the government, which is in no manner engaged in the business of transmitting telegraphic messages. It may enact laws in relation to them, as to other corporations, but has no business connection with them. On the other hand, postal facilities were established by Congress; the mails are carried by the government through its own agents, and penal statutes protect communications sent through the mail;"³⁸ he further says: "there is no statute of this state or principle of law which places a telegram on a different ground from that which any other communication occupies, made by one through another, to a third party, with respect to the liability of the confidant to be called as a witness to produce it and testify to it. There is no such analogy between the transmission of communications by mail and their transmission by telegraph as would justify the application to the latter of the principles which obtain with respect to the former; and certainly penal statutes in relation to one cannot by the court be declared applicable to

³⁵ Scott and Jarnagin on Telegraphs, sec. 136-138; Gray on Telegraphs, sec. 25; Redfield on Carriers, sec. 567; *Bank of California v. West. U. Tel. Co.*, 52 Cal. 280.

³⁶ See elsewhere disclosure of a tele-

gram where subject is more fully discussed.

³⁷ See Chapter on Privilege Communication.

³⁸ Ex parte Brown, 72 Mo. 83. 37 Am. Rep. 428.

the other.³³⁹ There are some, however, who urge that the same rule could apply to the telegraphic communications and those carried on through the mail, although we feel safe in accepting the above remarks of Judge Henry. The postal system is under the absolute control of Congress, while the telegraph companies are not. The laws under which the former are carried on did not contemplate making telegraphic communications a part of the postal system, and before they can, there must be laws passed which will include these companies. It is true that a vast amount of trade, traffic and business is transacted through this medium and on account of which they have become almost equal in importance to the commercial world with the postal system, but before they can come under and be controlled by the laws of the latter, there must be statutes passed to that effect.

³³⁹ *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 428.

CHAPTER IV.

CORPORATE RIGHTS AND FRANCHISES.

§ 42. Definition.

- 43. Franchise and charter distinguished.
- 44. Same continued—distinction between franchise and license.
- 45. Kinds of franchises.
- 46. Alienability of franchise—primary.
- 47. Same continued—secondary.
- 48. Same continued—leases.
- 49. Same continued—legislature may authorize alienation.

§ 42. Definition.

All persons who undertake to create any kind of a corporation must first obtain from the state the right or privilege of becoming a corporation and doing such business as they may desire under same. The right or privilege is their franchise. It is hardly necessary to go into the full nature of a franchise, as the subject is one to be treated under a work on corporations, but it will be our pleasure to say a few things about franchises as explanatory of remarks which will necessarily follow as to the vendibility of franchises. In discussing this subject, we will first define the term "franchise," and then specify the different kinds. The legal idea of a franchise seems to be a power or privilege conferred by the state upon an individual, upon a collection of individuals, or upon an incorporated body, not possessed by the inhabitants of the state as of common right. Finch defines franchise "to be branches of the royal prerogative subsisting in the hands of the subject by grant from the King."¹ Under our government and laws this definition would not be strictly correct. Here they spring from contracts between the sovereign power and a private citizen, made upon a valuable consideration, for purpose of public benefit as well as individual advantage.² Chancellor Kent says: "Franchises are privileges conferred by grant from the government, vested

¹ Cruise Digest 278. This is substantially the definition of Blackstone, 2 Bl. Com. 37.

² State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109.

in private individuals.”³ A franchise is nothing more than the right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation’s charter.⁴ Such right or franchise is defined by Bouvier to be “a certain privilege conferred by grant from government, and vested in individuals.”⁵

§ 43. Franchise and charter distinguished.

There is a distinction between a franchise and a charter. A charter contains the grant of a franchise, but it is not the franchise itself. There is generally no evidence that a franchise has been granted except the charter which contains the grant. The constitutional inhibition against impairing the obligation of contracts is not operative upon the charter but upon the contract which the charter contains, and protects franchises because they are valuable property or contract rights.⁶

§ 44. Same continued—distinction between franchise and license.

It is said by some that there is a distinction between a privilege granted by the legislature and a municipal license, in that a municipal corporation cannot grant a franchise but can grant only a mere license.⁷ The distinction is believed to be untenable, for they are both acquired from the legislature, one directly, and the other indirectly or through the municipal corporation, and in each privilege are conferred rights which are not enjoyed by the inhabitants as of common right.⁸ Another distinction exists between a privilege granted to the corporation or its members as corporators, and a mere personal privilege annexed by state or charter to membership in a corporation: as an exemption of its servants or employees from working on the public roads, serving as jurors or serving in the army. Such

³ 3 Kent Com. 458.

⁴ *Fietsam v. Hay*, 122 Ill. 293, 3 Am. St. Rep. 493, 13 N. E. 901.

⁵ 1 Bouv. L. Dict. See following cases for other definitions. *State v. Western Irrigating Canal Co.*, 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166; *Abbott v. Omaha Smithing, etc., Co.*,

4 Neb. 416; *Augusta Bank v. Earle*, 15 Pet. (U. S.) 519, 10 Led. 274.

⁶ *Oakland R. R. Co. v. Oakland, etc., Co.*, 45 Cal. 365.

⁷ *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673.

⁸ *State v. East Cleveland R. Co.*, 6 Ohio Cir. Ct. 318.

an exemption is held by some courts as a mere personal privilege,⁹ by others it is held that it is not a mere personal privilege to the employees of the corporation; and still by others, it is held a right or privilege of the corporation itself.¹⁰

§ 45. Kinds of franchises.

Enough has been said about the definition of a franchise; so we shall now consider the kinds or classes of franchises which may be vested in corporations. There are two kinds of franchises, and it is necessary to have a clear understanding of each in order to be able to distinguish between the two and see why one is alienable and the other is not. There is a primary franchise and a secondary franchise. The primary franchise is the right of being or existing as a corporation. It is a right granted by the legislature to a body of men to be and act as an artificial person, without incurring individual liability. It is the right to be, to exist, to be known, and to be recognized as a corporation and clothed with such rights and immunities as are not enjoyed by the people in common.¹¹ The secondary franchise

⁹ *Neeley v. State*, 4 Lea. (Tenn.) 316.

¹⁰ *Johnson v. State*, 88 Ala. 176, 7 So. 253; *Zimmer v. State*, 30 Ark. 677. The latter is a mere personal privilege and is subject to legislative revocation or control. In *re Scranton*, 74 Ill. 161; *Bragg v. People*, 78 Ill. 328; *Branish v. State*, 6 Baxt. (Tenn.) 530; *Dumme v. People*, 94 Ill. 120, 34 Am. Rep. 213.

¹¹ While discussing this question, Judge Sawyer, in the course of his very able opinion said: "The creative act necessarily extends only to the bringing into being of an artificial person, with the capacity stated among which is a capacity to receive and enjoy in common grants and privileges immunities; that is to say a capacity to receive and enjoy such grants, privileges and immunities as may be made either at the time of the creation or any other time. The creation of the

being with the capacity to receive grants, is one thing; the granting of other privileges and immunities, which it has the capacity to receive when created, is another. When such a being is brought into existence, a corporation has been created. A legal entity, a person has been created with a capacity to do by its corporate name, such things as the legislative power may permit, and receive such grants of such rights and privileges and of such property, as the legislature itself or private persons with the legislative permission may give. But I do not understand that every right, privilege, or grant that can be conferred upon a corporation must be given simultaneously with the creative act of incorporation. On the contrary, I suppose the artificial being must be created with a capacity to receive before anything can be received. The right to be a corpor-

is the right to construct, operate and maintain a corporation. The one is the right to be a corporation and the other is the right to carry on and operate the same after the primary franchise has been vested in the corporation. The secondary franchise cannot exist until the first has been vested in the corporators and it would be needless to vest the latter—and yet it may be done—in the corporators without the former being, or to be, in existence. In other words, to be more specific in the matter and to apply the general corporation law in regard to the point at issue to the subject of this treatise, the primary franchise vested in a telegraph or a telephone company is the right vested in the corporation or corporators to exist as one of these companies, and the secondary franchise is the privilege to construct and maintain its lines and to carry on and operate the business of transmitting intelligence by means of electricity.

§ 46. Alienability of franchise—primary.

Having considered the definition of a franchise and the different kinds, we hope the reader will be the more able to see why one franchise may under some circumstances be alienated while the other may not; and this we shall now discuss. The primary franchise, or the right or privilege to be a telegraph or telephone company, cannot be alienated, either absolutely or conditionally, without the consent of the creating power.¹² There is by no means the same harmony

ation is itself a separate distinct and independent franchise, complete within itself, and a corporation having been created, enjoying this franchise, may receive a grant and enjoy other distinct and independent franchises, such as may be granted to and enjoyed by natural persons. But because it enjoys the latter franchises, they do not, therefore, constitute a part of the distinct and independent essential franchise—the right to be a corporation. They are additional franchises given to the corporation, and not parts of the corporation itself—not of the essence of the corporation.” *Southern, etc., Co. v. Orton*, 32 Fed. 457, 473.

¹² *Commonwealth v. Smith*, 10 Allen 448, 87 Am. Dec. 672; *Richardson v. Sibley*, 11 Allen 65, 87 Am. Dec. 700; *Penn. R. R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 6 S. Ct. Rep. 1094; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 12, 72 Am. Dec. 685; *Roper v. McWhorter*, 77 Va. 214; *Hall v. Sullivan R. R. Co.*, 2 Red. Am. Ry. 621; *Gue v. Tide-Water Canal Co.*, 24 How. 257; *Morgan v. Louisiana*, 93 U. S. 217; *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Clark v. Omaha, etc., R. Co.*, 4 Neb. 458; *Black v. Delaware, etc., Canal Co.*, 24 N. J. Eq. 465; *Amman v. New Alexandria Turnpike Co.*, 13 Serg. and R.

of opinion as to the fundamental principles upon which the doctrine is based. The following reasons have been assigned by the courts for its existence: A franchise is a personal trust, and the state has therefore a right to declare who shall be the transferee of such trust;¹³ a corporation enjoying public franchises is an agent of the state and on the ordinary principles of agency is incapable of delegating its powers without the permission of the principal;¹⁴ a grant of a public franchise is a contract between the state and the grantee, by which the latter undertakes to perform certain public duties, from the performance of which he cannot release himself without the consent of the other contracting party;¹⁵ the powers of the grantee of a fran-

210, 15 Am. Dec. 593; Gulf etc., R. Co. v. Morris, 67 Texas 692; Buffett v. Great W. R. R. Co., 25 Ill. 353; Arther v. Commercial Bank, 9 Smedes & M. 394, 48 Am. Dec. 719; Ragan v. Aiken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684; Troy etc., R. Co. v. Kerr, 17 Barb. 581; Troy and Boston R. Co. v. Boston Hoosac Tunnel etc., R. Co., 86 N. Y. 107; Abbott v. Johnston, etc., R. Co., 80 N. Y. 27, 36 Am. Dec. 572; People v. Albany etc., R. Co., 77 N. Y. 232; East Boston Freight Co. v. Hubbard, 10 Allen 459; Stockton v. Central R. Co., 50 N. J. Eq. 52; Fitsan v. Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492; Bordstown etc., R. Co. v. Metcalf, 4 Metc. 199, 81 Am. Dec. 541; Kennebec etc., R. Co. v. Portland etc., R. Co., 59 Me. 9; State v. Consolidation Coal Co., 46 Md. 1; Richards v. Merrimac etc., R. Co., 44 N. H. 127; Pittsburg, etc., R. Co. v. Allegheny County, 33 Pa. St. 126.

¹³ Shepley v. Atlantic, etc., R. Co., 55 Me. 395; Kennebec, etc., R. Co. v. Portland, etc., R. Co., 59 Me. 9; Bank of Middlesbury v. Edgerton, 30 Vt. 182; Miller v. Rutland, etc., R. Co., 36 Vt. 452; U. S. v. West. U. Tel. Co., 50 Fed. 28; U. S. v. Union Pac. R. Co., 160 U. S. 1, 16 S. Ct. Rep. 190; U. S.

v. Northern Pac. R. Co., 120 Fed. 546; Reiff v. West. U. Tel. Co., 49 N. Y. Super. Ct. 441; Benedict v. West. U. Tel. Co., 9 Abb. N. Car. (N. Y.) 214.

¹⁴ Beman v. Rufford, 1 Sim. N. S. 569; Great Northern R. Co. v. Eastern Counties R. Co., 9 Hare. 306; Winch v. Birkenhead, etc., R. Co., 5 DeGex. & S. 562, 13 Eng. L. & Eg. 506; Richmond Water Works Co. v. Richmond L. R., 3 ch. Div. 82.

¹⁵ Thomas v. Railroad Co., 101 U. S. 83. In this case the court by Justice Miller, very ably said: "The principle is that where a corporation like a railroad company has granted to it by charter a franchise in a large measure intended to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions or by which it undertakes without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantee of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy." See also, Com. v. Smith, 10 Allen 448, 87 Am. Dec. 672; Roper v. McWhorter, 77 Va. 214;

chise like other grantees of the sovereignty are strictly limited by the instrument of grant, and the existence of a power to alienate such a franchise cannot be inferred in the absence of express statutory provisions; ¹⁶ transfer of franchise may sometimes be illegal, as tending to the establishment of monopolies. ¹⁷ It has been held that a mortgage deed which professes and manifests an intent to convey the franchise of being a corporation will not be for that reason entirely void, but will be operative to convey the property, and perhaps also the secondary franchises, being void only so far as it undertakes to convey the corporate capacity of the mortgagor. ¹⁸ Neither can they be alienated or seized under judicial process by creditors, without the consent of the legislature, because this would disable them from discharging the public duties which they have assumed and in consideration of which their franchises have been granted to them. ¹⁹ The fact

Munroe v. Thomas, 5 Cal. 470; Lau-
man v. Lebanon, etc., R. Co., 30 Pa.
St. 42, 72 Am. Dec. 685; Central
Transportation Co. v. Pullman Palace
Co., 139 U. S. 24, 11 S. Ct. Rep. 478;
Freeman v. Minneapolis, etc., R. Co.,
23 Me. 443; Kenton County Court v.
Turnpike Co., 10 Bush 529; Lakin v.
Railroad Co., 13 Or. 436, 11 Pac. 68,
57 Am. Rep. 25; Pierce v. Emery, 32 N.
H. 484; Railroad Co. v. Brown, 17
Wall. 445; Chicago Gas Light Co.
v. People's Gas Light Co., 121 Ill.
530, 13 N. E. 169, 2 Am. St. Rep. 124;
Black v. Delaware, etc., Canal Co., 22
N. J. Eq. 130; New York, etc., R. Co.
v. Winans, 17 How. 30.

¹⁶ Thomas v. Railroad Co., 101 U. S.
82; Board of Coms. of Tippecanoe
County v. Lafayette, etc., R. Co., 50
Ind. 85; People v. Chicago Trust Co.,
130 Ill. 268, 22 N. E. 798, 17 Am. St.
Rep. 319, 8 L. R. A. 497n; Lauman v.
Lebanon, etc., R. Co., 30 Pa. St. 42, 72
Am. Dec. 685; Penn. R. Co. v. St.
Louis, etc., R. Co., 118 U. S. 290, 6
S. Ct. Rep. 1094; Richardson v. Sib-
bley, 11 Allen 65, 87 Am. Dec. 700; Ab-
bott v. Johnston, etc., R. Co., 80 N.

Y. 27, 36 Am. Rep. 572; Black v. Del-
aware, etc., Canal Co., 24 N. J. Eq.
464; Central Trans. Co. v. Pullman
Car Co., 139 U. S. 24, 11 S. Ct. Rep.
478.

¹⁷ State v. Standard Oil Co., 49 Ohio
St. 137, 30 N. E. 279, 34 Am. St. Rep.
541, 15 L. R. A. 145.

¹⁸ Butler v. Rahm, 46 Md. 541; Pull-
man v. Cincinnati, etc., R. Co., 20 Fed.
Cas. No. 11461, 4 Biss 35; Fietsam v.
Hay, 122 Ill. 293, 13 N. E. 501, 3 Am.
St. Rep. 492.

¹⁹ Hays v. Ottawa, etc., R. Co., 61
Ill. 422; Tippecanoe County v. Lafay-
ette, etc., R. Co., 50 Ind. 85; Anderson
v. Cin. Sou. R. Co., 86 Ky. 44, 5 S.
W. 49, 9 Ky. L. Rep. 303, 9 Am. St.
Rep. 263; Treadwell v. Salisbury Mfg.
Co., 7 Gray 393, 66 Am. Dec. 490;
Charlotte v. Omaha, etc., R. Co., 26
Neb. 159, 4 L. R. A. 135, 41 N. W.
1106; Richards v. Merrimac, etc., R.
Co., 44 N. H. 127; Susquehanna Canal
Co. v. Bonham, 9 Watts & S. 27, 42
Am. Dec. 315; International, etc., R.
Co. v. Eskford, 77 Texas 274; Naylee
v. Alexandria, etc., R. Co., 83 Va. 707.
3 S. E. 369, 5 Am. St. Rep. 303; Gibb-

that the alienation would be beneficial to the pecuniary interest of both the telegraph or telephone companies and also the public, is not a matter to be considered by the court in a question of this nature.²⁰ And it makes no difference who are the incorporators of the telegraph company and for what general purpose it was created. For instance, where a railroad company is authorized to construct, in connection with its railroad, a telegraph line; to manage and control the same; and to fix the rate of charges thereon; a contract made in the absence of the legislative consent by which it undertakes to divest itself of this public duty, by transferring the privilege to another company, is *ultra vires* and void.²¹ Some courts hold that an agreement entered into by a telegraph company with a similar company to divide earnings and expenses is neither *ultra vires* nor against public policy.²²

§ 47. Same continued—secondary.

While there may be some doubt entertained as to the right of a telegraph company to alienate its secondary franchise without the legislative consent, the prevailing doctrine is, however, that it has no right to make such a conveyance in any form whether by sale,²³ lease or mortgage. There may be an exception to the rule in that it may sell all the personal property, or, at least so much thereof, as is not necessary for the purpose of discharging its public duties.²⁴

v. Consolidated Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979.

²⁰ *West. U. Tel. Co.*, 50 Fed. Rep. 28.

²¹ *Central Branch Union Pac. R. Co. v. West. U. Tel. Co.*, 3 Fed. 417, 1 McCrory 557; *West. U. Tel. Co. v. U. Pac. Co.*, 3 Fed. 1, 1 McCrory 581; *Atlantic, etc., Tel. Co. v. Union Pac. R. Co.*, 1 Fed. 745, 1 McCrory 188, 541. Compare *West. U. Tel. Co. v. Kansas Pacific R. Co.*, 4 Fed. 284; *West. U. Tel. Co. v. St. Joseph, etc., R. Co.*, 3 Fed. 430, 1 McCrory 565; *West. U. Tel. Co. v. Union Pac. R. Co.*, 3 Fed. 423, 1 McCrory 558.

²² *Benedict v. West. U. Tel. Co.*, 9 Abb. N. Cas. (N. Y.) 314.

²³ *Richardson v. Sibley*, 11 Allen 65,

87 Am. Dec. 700; *Com. v. Smith*, 10 Allen 448, 87 Am. Dec. 672; *Worcester v. Western R. Corp.*, 4 Metc. 564; *Arther v. Com., etc., Bank*, 9 Smede & M. 394, 48 Am. Dec. 719; *Pierce v. Emery*, 32 N. H. 484; *Central Trans. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 S. Ct. 478, 25 L. Ed., 55; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 98 Ct. 409, 32 L. Ed. 837 [reversing 22 Fed. 245, 10 Sawy. 464, 23 Fed. 232, 10 Sawy. 472]; *Thomas v. Western Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *New York, etc., R. Co. v. Wimans*, 17 How. 31, 15 L. Ed. 27.

²⁴ *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Arther v. Commercial Bank*, 9 S. & M. 394.

But it cannot alienate the franchise to manage or control its lines, as this would result in the company becoming powerless to perform its public duties. And if it has public duties to discharge it cannot be alienated or seized under judicial process by creditors without the consent of the legislature,²⁵ nor be levied on by execution;²⁶ and should a telegraph company alienate its franchise to another company without statutory authority, it will be liable to third parties for all torts committed on them by their successors.²⁷ Nor can it release itself from its contract obligations on the claim that the agreement was ultra vires and against public policy.²⁸

§ 48. Same continued—leases.

For the same reason that a telegraph company cannot alienate absolutely or conditionally its franchise of being a corporation, it cannot, by lease or any other contract, in the absence of legislative authority, turn over to another corporation its line and the use of its franchise, since, a lease might have the same effect as a sale of the property;²⁹ however, it has been held that a telegraph company could lease its lines and equipments for a reasonable length of time.³⁰ For instance, where a contract is entered into between two companies, whereby one leases to the other its franchises for a period of nine hundred and ninety-nine, or any great number of years, the lease

48 Am. Dec. 719. It may be conveyed by authority of a legislative enactment to that effect. Thus, a franchise granted by a city to a telephone company to maintain its line in the streets of such city, may be transferred and sold to another corporation without the consent of the municipality under a statute expressly authorizing corporations to alienate their property. *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87n.

²⁵ *Treadmill v. Salisbury Mfg. Co.*, 7 Gray 393, 66 Am. Dec. 490; *National Foundry Works v. Oconto U. Co.*, 52 Fed. 43; *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199; *Gulf, etc., R. Co. v. Newell*, 73 Texas 334, 15 Am. St. Rep. 788.

²⁶ *Amman v. New Alexandria & Pitt. Turnpike Road*, 13 Sergent & Rawle 210, 15 Am. Dec. 593.

²⁷ *Naglee v. Alexandria, etc., R. Co.*, 83 Va. 707, 3 S. E. 369, 5 Am. St. Rep. 308.

²⁸ *Canal & C. R. Co. v. St. Charles St. R. Co. (La.)*, 11 So. 702.

²⁹ *Thomas v. R. R. Co.*, 101 U. S. 71; *Penn. R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 6 S. Ct. Rep. 1094; *Oregon R. v. Oregonian R.*, 120 U. S. 1, 9 S. Ct. Rep. 409; *State v. Atchison R. Co.*, 24 Neb. 143, 8 Am. St. Rep. 164, 38 N. W. 43.

³⁰ *Philadelphia v. West. U. Tel. Co.*, 11 Phila. (Pa.) 327, 33 Leg. Int. (Pa.) 129; *West. U. Tel. Co. v. Baltimore, etc., R. Co.*, 69 Md. 241.

would virtually, under such circumstances, amount to a sale. Where a telegraph company has a public duty to perform and the same has been acquired by a legislative grant, it cannot dispose of the obligations so acquired, in any manner, without the consent of the granting power.³¹ Where the legislature gives the right to a telegraph company to lease its line to another company, the grant does not necessarily carry with it the franchise of being a corporation, and thereby exempt the lessor from the responsibilities for which it has obligated itself.³² It is the duty of the parties to the contract of lease to abandon the contract, after they learn the true status of their condition.

§ 49. Same continued—legislature may authorize alienation.

The legislature may by express terms authorize a telegraph or telephone company to alienate its franchise,³³ but it must be by an express grant or by reasonable implication. An unauthorized transfer of a franchise may be afterwards ratified by the legislature, but there must be an expressed intent on the part of this body to ratify the transfer.³⁴ Where the right to alienate a franchise has been given by the state, a lease of such franchise may be implied from such grant. A mortgage may also be given on such property from the authority to sell, where a telegraph company has the consent of the state to alienate its franchise; and where a sale has been consummated under such authority, the purchasers thereof take the property subject to all the duties of the vendors.³⁵

³¹ *Richketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901, 7 L. R. A. 534; *Gulf, etc., R. Co. v. Newell*, 73 Tex. 334, 15 Am. St. Rep. 788.

³² *Harmon v. Columbia, etc., R. Co.*, 28 S. Car. 401, 13 Am. St. Rep. 686.

³³ *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87n.

³⁴ *Thomas v. Railroad Co.*, 101 U. S. 71.

³⁵ An ordinance granting to a telegraph company the right to occupy the city streets stipulated that in the event of a sale by the company of its properties, its vendee should be bound by all the obligations imposed on the or-

iginal company. Such a sale took place afterward, and for some time after the sale the purchasing company gave the subscribers of the purchased company connections with its own subscribers. It was held that the purchasing company, having bought with notice, was bound to assume and carry out all the obligations of the old company; and that its action in purchasing the old company's subscribers with connections to its own lines operated as an acknowledgement by it of the character of its assumed obligations, and that it could not thereafter discontinue such connections. *Mahon v. Mich. Tel. Co.*, 93 N. W. 629.

CHAPTER V.

RIGHT OF WAY.

- § 50. Definition.
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- 52. Same continued—compensation.
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- 64. Same continued—along railroads—compensation, when allowed.
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- 66. Same continued—the act does not affect the right to compensation.
- 67. Same continued—right acquired by agreement.
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- 70. Condemnation proceedings—must be under state statutes.
- 71. Act otherwise considered.
- 72. State grants.
- 73. On railroad.
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- 75. Same continued—award.
- 76. Canal—under same statutes.
- 77. The term “highway” embraces city streets.
- 78. Conditions of grantee.

§ 50. Definition.

It would be proper, in considering the term “right of way” and the accompanying incidents thereunder, to first learn what is meant by such a term. A “right of way,” as applied to telegraph and telephone com-

panies, is the right held by these companies in the land on which their poles, guys and other similar appliances are erected; and that, to a certain extent, over which their wires are strung. The exact property a telegraph or telephone company has to the land upon and over which its lines are constructed is not the same at all points. That which is possessed by them depends upon the manner in which the right was acquired; whether by purchase, by grant, or by the exercise of the right of eminent domain. If the right is acquired by either of the first two ways, it will be determined by the terms of the conveyance or patent; as, when a deed is made to one of these companies in which the right of way is described by metes and bounds, the exact property conveyed to the company will depend upon the construction of the deed. In the latter case the company would only possess an easement, the fee remaining in the original owner, except where it is otherwise provided by statute.

§ 51. Interest in land acquired.

It seems very clear that the company, unless it is so expressed in the deed or patent, should not have the same interest in the land lying between the poles and in the land over which the wires are stretched, as it has in that on which the poles are erected. It is very true, unless the wires are strung near the surface of the ground, that the company has little use for this land between the poles and its use for former or other purposes is in no wise prevented, whether it lies along the public highway or over private property.¹ We presume that there is no question but that it could be described in the deed so as to make a conveyance of it; but the question is, is the right of way over this

¹ A telegraph company by a judgment condemning land for its use under the eminent domain Act does not acquire the fee to the land or the right to use it for any other purpose than to erect telegraph poles and suspend wires upon them and maintain and repair the same, and use the structure for telegraph purposes. This of course, gives the company the right at all times when necessary, to con-

struct or repair the line, to enter upon the strip condemned, doing as little damage as possible. The company can not cultivate such strip, or take exclusive possession of it or enjoy it for any other purpose. The only exclusive right of occupancy the company acquires is the ground occupied by the poles erected for telegraphic purposes. *Loekie v. Mutual U. Tel. Co.*, 103 Ill 401.

land conveyed, or at least is the same interest therein conveyed as that on which the poles are erected, when its metes and bounds are not expressly stated? We answer the question in the negative. It is not like the right of way of a railroad, since it is absolutely necessary for the latter to have the same interest in all the land on which its bed or embankment is built. In the case of a telegraph or telephone company, the land is of no use whatever to the company except to go upon for the purpose of constructing and keeping its lines in repair; and when it is used for this purpose, the adjoining land as well as this, is almost as often used.²

§ 52. Same continued—compensation.

Both state and federal constitutions provide that private property shall not be taken for public use without just compensation first being made to the owner thereof, or secured to be made. This is a right given to every individual by the supreme law of the land for the protection of his property, and without which he would be living in a state of nature, harassed and annoyed by his pilfering neighbors. It follows, therefore, that before a telegraph or telephone company can acquire a legal right of way, it must obtain the right either by deed, by patent, by prescription, or by payment of damages after proper condemnation proceedings; and if one of these companies acquires the right of way not according to one of these methods, it will be *prima facie* guilty of trespass, and the owner of the land may therefore maintain an action of damages or ejectment at his election.

§ 53. Same continued—owner not estopped.

In many cases telegraph and telephone companies enter upon the land of another without the latter's knowledge or consent; but the fact that they do, or that he permitted them to do so, does not give the company a title to a right of way or estop him from maintaining an action for damages;³ and yet, it may preclude him from main-

² *Lackie v. Mutual U. Tel. Co.*, 103 Ill. 401.

³ *Bashfield v. Empire St. Tel. Co.*, 18 N. Y. Supp. 250; *Abendroth v.*

Manhattan R. Co., 122n N. Y. L. 19 Am. St. Rep. 461, 11 L. R. A. 634n;

Brownson v. Albion Tel. Co., 93 N. W. 201, 60 L. R. A. 429; *Maxwell v. Cen.*

maintaining an action of ejectment.⁴ The mere failure of the landowner to order the company off of his land, or to bring an action against it as a trespasser until near the end of the statute of limitation, will not operate as a consent to its use and occupation; but an unreasonable delay in such a case, in insisting upon damages, will be considered a waiver of damages by the owner. And should he stand by until the line is completed and in operation and public interest has become involved, he will be denied the right to maintain an action of ejectment, or the right to enjoin them. His only remedy under such circumstances is a proceeding brought to recover damages.

§ 54. Further considered—how and from whom acquired.

Having briefly considered the nature and meaning of the term "right of way," we shall now apply ourselves to a somewhat lengthy discourse on the subject of the sources from which the right of way may be acquired, and the manner in which it is acquired under each. But in treating these two—that is, the sources from which the right of way may be acquired, and the manner in which it is acquired under each—we shall consider them together as nearly as possible. There are several different sources from which a right of way may be acquired. As for instance, it may be acquired by a grant from the government or a federal grant; or by a state grant; or by a municipal grant; or by an agreement with the owner of the land, when it is over private land; or by a contract with a railroad company, when it is to be constructed along its roadbed. And first among these different sources to be discussed, we shall take up the subject of a federal grant.

§ 55. Same continued—federal grant.

We now come to the subject of a right of way, acquired by a telegraph company by a grant from the government; but before entering into the subject, we shall say a few things in regard to the nature of

tral Dist., etc., Tel. Co., 57 W. Va. 121; Omaha v. Flood, 57 Neb. 124, 77 N. W. 379.

⁴Daflings v. Pittsburg, etc., Tel. Co., 3 Pits. Leg. J. U. S. (Pa.) 37, 14 York Leg. Rec. (Pa.) 46.

a federal grant. If our fellow-lawyer, while reading this work, should become bored by a constant discourse of every subject which is seemingly worthless to him in the present case, and apparently foreign to the matter at issue, we only beg to humbly bow most graciously and apologize by saying that while it may appear this way, we have deemed it best to deprive him of some of his time and pleasure in order that he may be the more able to understand and appreciate those legal principles which are to follow. A federal grant, broadly stated, is a conferring, by the federal government, of a franchise by charter, in which certain rights are given to a corporation not enjoyed as of common right; or a mode, or act of creating a title or interest in any person or corporation to land which had previously belonged to the granting power. In the present instance, it will be our purpose to consider the first part of this definition—a franchise conferred upon a corporation. There is a difference between a grant from our government and one from the crown with respect to the power of revocation. With us, the grant is an executed contract made by the government as one party to the contract and the corporation as the other; neither can rescind or revoke the contract without the other's consent, unless the right has been reserved in some manner, or except for special causes and by the process of law.⁵ No law can be passed by the supreme lawmaking power which would in effect annul or revoke the grant, as each individual has a constitutional guarantee that no law shall be passed which would impair the obligation of any of his contracts. While grants from the crown may be avoided, upon three grounds: First, where the crown professes to give a greater estate than it possesses in the subject-matter of the grant; second, where the same estate or part of same estate has already been granted to another; and third, where the crown has been deceived in the consideration expressed in the grant.⁶

§ 56. Same continued—what is granted.

A federal grant of a right of way to a telegraph company is an easement or privilege conferred thereon for a valuable consideration,

⁵Duncan v. Beard, 2 N. & M. (S. Car.) 400; Nichols v. Hubbard, 5 Rich. (S. Car.) 267.

⁶Gladstone v. Earl of Sandwich, 5 M. & G. 995, 12 L. J. C. P. 41. See Com'th v. Boley, 1 Weekly Notes, Pa. 303.

after certain conditions are complied with, to construct and operate a line of wires over lands in which it has a fee simple title. By an early act of Congress, and supplemental legislation thereto, a right of way was granted to telegraph companies, over public lands and all military and post-roads of the United States, after complying with certain conditions therein prescribed.⁷ There is no question as to the constitutionality of these laws as they were enacted under the power given Congress to control interstate commerce.

§ 57. Statutes defining what are post-roads, etc.

Similar statutes have been passed defining what shall be post-roads, and within the term are included all letter carriers or free delivery routes,⁸ and all railroads or parts of railroads over which mails are carried.⁹ Thus the streets of the District of Columbia are "post-

⁷ United States statute authorizing occupation of Post Roads by telegraph lines, U. S. Rev. Stat., §§5263-5268; 14 U. S. Stat. at Large 221; Act of July 24, 1866. "Any telegraph company organized under the laws of any state, shall have the right to construct, maintain and operate telegraph lines over any part of the public domain, over and along any of the military or post roads of the United States, and under or across any of its navigable streams or waters; provided such lines are not so placed as to obstruct navigation, or interfere with the proper use of the military or post roads." U. S. Rev. Stat., § 5263. "Any such company may take from the public lands through which its line passes the necessary stone, timber and other materials for its poles, stations or other needful uses in constructing its line, and pre-empt such portion of the unoccupied public land as may be necessary for its stations, not exceeding forty acres for each station: such stations to be not

within fifteen miles of each other." U. S. Rev. Stat., §5264. The Act of March 3, 1901, c. 832, providing for grants to telegraph companies of franchises in the Indian Territory necessarily annulled all previous conflicting grants made by any of the Indian nations. *Muskogee Nat. Tel. Co. v. Hall*, 55 C. C. A. 208, 118 Fed. Rep. 382, disapproving *Muskogee Nat. Tel. Co. v. Hall* (Ind. Ter. 1901) 64 S. W. 600. By Act of Congress of March 3, 1901 (31 U. S. Stat. L. 1084), the secretary of the interior is given full authority to grant of rights of way to telegraph lines in the territory and no line may be constructed there without authority from him: *Muskogee Nat. Tel. Co. v. Hall* (Ind. Ter., 1901), 64 S. W. 600.

⁸ Act of Congress, June 18, 1872; U. S. Rev. Stat., §3964. See *Toledo v. West. U. Tel. Co.*, 107 Fed. Rep. 10, 46 C. C. A. 111.

⁹ Act of Congress, June 18, 1872; U. S. Rev. Stat., §3964. See case cited in note 8.

roads" within the meaning of the statute.¹⁰ It supersedes all conflicting state legislation on the same subject.¹¹

§ 58. Must comply with conditions—character of.

No telegraph company acquires any rights under these statutes until it has filed with the postmaster-general its written acceptance of all the conditions therein imposed.¹² This question was settled in a case in which a telegraph company, in the exercise of the right of eminent domain, instituted a proceeding to condemn and appropriate so much of a bridge, which was built across a navigable river in pursuance of state and national legislation, as was necessary to support a line of wires proposed to be built thereon, and for the construction, maintenance and operation of same. The company owning the bridge, claiming that the condemnation proceeding was without authority of law, brought an action to enjoin the construction of such lines. The court held in this case that before the company could exercise the right of eminent domain with respect to the crossing of the bridge, it would be necessary to file a written acceptance of all the conditions of these statutes.¹³ The obligations and restrictions to be accepted are important in their character; one of which is that the telegraph line should be so constructed and operated as not to obstruct the navigable streams and waters, or interfere with travel on military roads.¹⁴ Congress has intervened and has seen fit to make the filing of a written acceptance an essential prerequisite to the building of a telegraph line over a navigable stream, and to the enjoyment of the privileges

¹⁰ *Hewett v. West. U. Tel. Co.*, 4 Mackay (D. C.), 424.

¹¹ *Pensacola v. Tel. Co. v. West. U. Tel. Co.*, 2 Woods (U. S.) 643, aff'd 96 U. S. 1; *West. U. Tel. Co. v. Atlantic, etc., Tel. Co.*, 5 Nev. 102. Compare *West. U. Tel. Co. v. New York*, 38 Fed. 552, 3 L. R. A. 449.

¹² "Before any telegraph company exercising any of the powers and privileges conferred, it shall file its written acceptance with the post-master gener-

al" of the restrictions and obligations required. U. S. Rev. Stat., §5263.

¹³ *Pacific, etc., Tel. Co. v. Chicago, etc., Bridge Co.*, 36 Kan. 113, 12 Pac. 535.

¹⁴ U. S. Rev. Stat., §5263. In constructing a line on a draw bridge, the line should be constructed so as not to interfere with the opening of the draw span of the bridge, or otherwise obstruct navigation. *Pacific Mut. Tel. Co. v. Chicago, etc., Bridge Co.*, 36 Kan. 113, 12 Pac. 535.

conferred by that act; and its authority is paramount.¹⁵ Before it can construct a line of wires across a navigable stream, it must first have obtained the grant from Congress under these acts; with all of which conditions it must comply. And should a line of wires be constructed along the bed of a navigable stream, without filing a written acceptance of the conditions stated in these statutes, and a steamer should be damaged by its anchor having been caught in the wires, the company will be liable for damages.¹⁶

§ 59. Scope and effect of act—statute permissive only.

It is held that this statute is permissive only:* and, that there is nothing in it which would imply that the permission to extend its lines along roads, not built or owned by the United States, or over and under navigable streams; or over bridges not built or owned by the federal government, carries with it any exemption from ordinary burdens of taxation. It may also be affirmed that it carries with it no exemption from the ordinary burdens which may be cast upon those who would appropriate to their exclusive use any portion of the public highway.¹⁷

§ 60. State cannot prohibit company from doing business therein on compliance with said act.

The state cannot therefore by any specific statute prevent a telegraph company from placing its lines along military and postroads; or stop the use of it after it has been placed there, after the company has complied with all the conditions of the statute.¹⁸ The power of Congress to grant to these companies the right of way over these roads and across public lands is absolute, and this power is acquired by the authority conferred in Congress to regulate interstate commerce; any law of a state which obstructs or burdens interstate commerce, or hin-

¹⁵ *Hewett v. West. U. Tel. Co.*, 4 Mackay (D. C.) 424.

¹⁶ *Rickmond*, 43 Fed. 85.

**St. Louis v. W. U. Tel. Co.*, 148 U. S. 102; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1; *West. U. Tel. Co. v. Att.-Gen.*, 125 U. S. 548; *Rick-*

mond v. Southern Bell Tel., etc., Co., 174 U. S. 761, 19 S. Ct. Rep. 778.

¹⁷ *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 S. Ct. Rep. 485.

¹⁸ *West. U. Tel. Co. v. Att.-Gen.*, 125 U. S. 530, 8 S. Ct. Rep. 961, quoted in *St. Louis v. West. U. Tel. Co.*, 148 U. S. 102.

ders the regular and legal administration of the government must be held to be unconstitutional and void.¹⁹ This act of Congress supercedes all conflicting state legislation on the same subject.²⁰

§ 61. Same continued—exception to power—police regulations.

These statutes do not deprive the state of its police power.²¹ While they may operate to prevent the state or any of its municipalities from an arbitrary or absolute exclusion of a telegraph company, which has complied with this provision, from any post-road,²² yet, they do not affect the rights of the state or its agency to regulate the use of streets and highways by such companies.²³ For instance, the streets in a town are included in the term "post-roads," and the authority therein could not exclude a telegraph company from entering upon its streets; yet, it could regulate the size and location of the poles, the height of the wires and their location; and where they become an obstruction and a nuisance, it could remove them or require them to be placed under the ground;²⁴ or it might impose a reasonable charge for the privilege of erecting and maintaining telegraph lines along its streets.²⁵ And a city ordinance requiring telegraph companies engaged in business within its corporate limits to pay a license tax, is valid and can be enforced notwithstanding the fact that the company has complied with all the conditions of such statutes.²⁶ So, also, the acceptance by a telegraph company of the provisions of these statutes, does not confer any exemption from taxation for state purposes upon lines and other property constructed within the state.²⁷

§ 62. Does not interfere with right to compensation.

When a telegraph company has acquired a right of way over the public highway by federal grant, the abutting landowners are not de-

¹⁹ *Moon v. City of Eufaula*, 11 So. 921.

²⁰ *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1; *West. U. Tel. Co. v. Atlantic, etc., Tel. Co.*, 5 Nev. 102.

²¹ *American, etc., Tel. Co. v. Hess*, 125 N. Y. 641, 13 L. R. A. 454n.

²² *West. U. Tel. Co. v. Att.-Gen.*, 125 U. S. 530, 8 S. Ct. Rep. 961.

²³ *People v. Squire*, 145 U. S. 175, 12 S. Ct. Rep. 880, affirming 107 N. Y. 593, 1 Am. St. Rep. 894; *Michigan Tel.*

Co. v. Charlotte, 93 Fed. 11; *Toledo v. West. U. Tel. Co. (C. C. A.)*, 107 Fed. 10.

²⁴ *American, etc., Tel. Co. v. Hess*, 125 N. Y. 641, 21 Am. St. Rep. 764, 13 L. R. A. 454n.

²⁵ *St. Louis v. West. U. Tel. Co.*, 148 U. S. 94, 13 S. Ct. Rep. 485.

²⁶ *Moone v. Eufaula*, 11 So. 921.

²⁷ *West. U. Tel. Co. v. Com.*, 125 U. S. 530, 8 S. Ct. Rep. 961.

prived of the right to be compensated for said right of way; because the land upon which the grant is given is burdened with an additional servitude or because the easement of access to their property has been obstructed; or because the enjoyment of the highway has been interfered with.²⁸ The reasons why the abutting landowner should be entitled to this compensation have been very ably given by Judge Brewer, and as the same could not be more logically given, it will be our pleasure to quote what he has to say in regard to this matter.

§ 63. Same continued—reason of rule.

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a state. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the federal government to a corporation, state or national, to construct interstate roads or lines of travel, transportation, or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same, when under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a state. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the statehouse grounds of the state, and construct its depot there, without paying the value of the property thus appropriated. Although the state-house grounds be property devoted to public uses, it is property devoted to the public uses of the state, and property

²⁸ *Kester v. West. U. Tel. Co.*, 108 Fed. 926; *Philips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022.

whose ownership and control is in the state, and it is not within the competency of the national government to dispossess the state of such control and use or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the state. This rule extends to streets and highways; they are the public property of the state. While for purposes of travel and common use they are open to the citizens of every state alike, and no state can by its legislation deprive the citizens of another state of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by citizen or a corporation of the same or another state, or a corporation of a national government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or streets railroads, telegraph or telephones, the state may, if it choose, exact from the party or corporations given such exclusive use, pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."²⁹

§ 64. Same continued—along railroads—compensation, when allowed.

For the same reason given above, a telegraph company cannot acquire a right of way along and upon the right of way of a railroad company without first compensating the landowner or the railroad company. This act of Congress is permissive only, and the manner in which the right of way is acquired by the condemnation proceedings is left with the laws of the state in which the road is located. In some instances, a railroad company constructs a line of wires along its roads for its own conveniences in carrying out the business of the company, such as the giving of orders and doing all other business necessary for the discharge and performance of its duties. When such is the case, the owner of the fee, if such may still be in him, will not be entitled to an additional compensation for the right of way: but if the line is built by any other corporation, by any kind of an

²⁹ St. Louis v. West. U. Tel. Co., 148 U. S. 92, 13 S. Ct. Rep. 485.

agreement entered into by the railroad and such corporation, the owner of the fee will be entitled to additional compensation, notwithstanding the fact that the telegraph company will, in connection with its other corporate business, render to the road the same services it would have obtained had the line belonged to the road, and had been built by it for its own convenience, provided it is not used exclusively for the benefit and convenience of the road.³⁰

§ 65. Same continued—compensation to road—reason for allowing.

The interest which a railroad company has to its right of way, regardless of the manner in which it is acquired, entitles it to be compensated by any telegraph company which condemns so much of said road as may be necessary for a construction of a line of its wires thereon, unless it is otherwise agreed to by the two companies; and this right is not affected in anywise by this act of Congress. Every citizen has a right guaranteed by the fundamental law of our land, that he shall not be deprived of any of his property rights without a due compensation therefor, determined by proper legal proceedings; and it is upon this guarantee to every American citizen in the security and protection of his property rights, which has formed and concentrated our government into one invulnerable unit and made it the grandest, the proudest and most powerful nation of the world. For the same reason that the property of a private person could not be taken against his consent by any corporation or body of persons without first paying him a due consideration for same, the property rights of any corporation cannot be legally acquired by any other corporation or body of persons without paying or tendering to said corporation a due compensation for said rights. Under our laws, a corporation is a citizen and is protected in the security of its property the same as a private individual. While a railroad may not have the same interest to the land on which its road is located as that possessed by an individual to his land, it nevertheless has an interest in this land or right of way for the purpose of carrying out its corporate business, paramount to any other person or corporation, and

³⁰ *Am. Tel. etc., Co. v. Smith*, 71 Md.

535, 18 Atl. 918, 7 L. R. A. 200.

therefore has the same right to be protected and secured in this right that an individual has to his private property. No one would presume to say that a telegraph or telephone company could construct a line of its wires over and across the property of an individual against his consent without first compensating him for said right; for he is as secure from the depredation of his property in this respect as by any other known way. This is his guaranteed right. There may be other ways in which the right of way of a railroad company may be used by other corporations or private citizens, but there is no way in which it is so often used and subjected as for telegraph companies whose wires are strung from one end of the road to the other, and on every road of any consequence; and to say that these telegraph companies should not compensate the railroad company for the use of its easement, would be unreasonable, unjust and would not protect the railroad in this guaranteed right.

§ 66. Same continued—the act does not affect the right to compensation.

Most all of our lands were originally acquired either directly or indirectly by grant from the United States and, by a technical meaning seldom considered, the paramount title to which was never granted, but for certain purposes and reasons it might under certain circumstances revert back to the original owner or grantor. It matters not what technical constructions may be placed on these grants from the government there is not the least possible or the remotest doubt but that the grantees of these lands have acquired all the right, title and interest in said grants to make them absolutely perfect and sound in every possible respect and superior to all other claims or demands, except such as may fall under the police power, or such as may be necessary to carry on the affairs of the public. While there may be a distinction between a grant of these lands and a grant of a right of way to a railroad company, in that the fee may not always be granted to the latter; yet, it is not to be presumed that Congress made such grants without, also, giving them the right to demand compensation for their rights of way when condemned by telegraph companies. And, so, it is held that telegraph companies must obtain the consent of the owners of the right of way, or condemn the same for telegraph

purposes and make compensation therefor.³¹ As was said by an eminent judge: "We cannot suppose it was the intention of Congress by these enactments, even if it had the power to do so, to put the right of way of every railroad company in the country at the mercy of the telegraph companies, and allow the latter to use them for the construction of their lines, without making compensation to any one therefor."³²

§ 67. Same continued—right acquired by agreement.

It is not always necessary that a condemnation proceeding be instituted in order for a telegraph company to acquire a right of way over the private property of an individual, for it may acquire the right by his consent or by an agreement entered into with him. The same rule of law may be applied to the right of way of a railroad. It may obtain a privilege from the railroad to construct its lines of wires upon and along the right of way of the road.³³

§ 68. Same continued—exclusive use—cannot be acquired.

This act does, however, prevent a railroad company's right of way from being exclusively used by one telegraph company.³⁴ The legislature of Florida granted an exclusive right to a certain company to construct its lines along the right of way of a railroad. It was held, however, that such a grant was in conflict with the act of Congress which was specially intended to secure to all companies equal privileges and to prevent monopolies, and that it could not stand.³⁵

³¹ *West. U. Tel. Co. v. Am. W. Tel. Co.*, 9 Biss. (U. S.) 72; *Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 159; *West. U. Tel. Co. v. Ann Arbor R. Co.*, 90 Fed. 379, 178 U. S. 243, 2 S. Ct. Rep. 867; *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315.

³² *Am. Tel. Co. v. Pearce*, 71 Md. 535, 7 L. R. A. 200n, 28 Am. St. Rep. 227, 18 Atl. 910. See also, *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, affirming 2 Woods (U. S.) 643.

³³ *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1.

³⁴ Under U. S. Rev. Stat., §5263, a railroad company cannot grant to a telegraph company the sole right to construct a line over the right of way, so as to exclude other companies whose lines would not interfere with those of the first company. *West. U. Tel. Co. v. Am. W. Tel. Co.*, 9 Bliss. (U. S.) 72; *West. W. Tel. Co. v. Am. W. Tel. Co.*, 9 Bliss. (U. S.) 72.

³⁵ A telegraph company in Texas cannot acquire by agreement with a railroad company the exclusive right to

§ 69. Same continued—different rule when grant from United States.

All that has been said heretofore in regard to the compensation paid to or tendered a railroad company for part of its right of way acquired by congressional grant for the use of telegraph companies, is applicable only to telegraph companies which were organized prior to 1872. The original act gave to telegraph companies the "right to construct, maintain, and operate lines of telegraph . . . over and along any of the military or post-roads of the United States, which have been, or thereafter may be declared such by law."³⁶ Congress afterwards, in 1872 declared all the railroads in the country which are now or may hereafter be in operation to be post-roads. When, therefore, a railroad company's right of way is one acquired by congressional grant subsequent to this last-mentioned act, the grants must be considered as made and accepted subject to the provisions of the act giving the telegraph companies the right to occupy and use such right of way without compensation.³⁷

use its right of way for a line of telegraph. *West. U. Tel. Co. v. Baltimore & O. Tel. Co.*, 19 Fed. 660, 22 Fed. 133; *West. U. Tel. Co. v. Am. W. Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781; *Baltimore, etc., Tel. Co. v. Morgan's Louisiana, etc., R. Co.*, 37 La. Ann. 883; *Pacific Postal Tel. Cable Co. v. West. U. Tel. Co.*, 50 Fed. 493; *Keasley on Electric Wires*, p. 135. See also *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211; *West. U. Tel. Co. v. Burlington, etc., R. Co.*, 11 Fed. 1, 3 *McCrary* (U. S.) 130. A railroad company maintaining telegraph wires granted to a telegraph company the right to place a wire on the poles of the railroad company and to establish stations and to do business with points off the road, the railroad company reserving to itself the right to the local business. It was held, that the right

granted was not exclusive, and that the railroad could put up and maintain another wire for its own use or for the use of a third party. *Marietta, etc., R. Co. v. West. U. Tel. Co.*, 38 Ohio St. 24. There are some authorities holding a contrary view on this subject. *Canadian Pacific R. Co. v. West. U. Tel. Co.*, 17 Sup. Ct. Com. 151; *West. U. Tel. Co. v. Chicago, etc., R. Co.*, 86 Ill. 246, 29 Am. Rep. 28; *West. U. Tel. Co. v. Atlantic, etc., Tel. Co.*, 7 Biss. (U. S.) 367. In view of the act of Congress, a state cannot grant to a telegraph company exclusive rights in the right of way of any railroad within the state. "The statute amounts to a prohibition of all state monopolies in this particular." *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, affirming 2 *Woods* (U. S.) 643.

³⁶ Act approved July 24, 1866.

³⁷ *Mercantile Transf. Co. v. Atlantic, etc., R. Co.*, 63 Fed. 579.

§ 70. Condemnation proceedings—must be under state statutes.

This act does not undertake to provide compulsory proceedings to condemn part of the right of way of a railroad for an easement for a telegraph company, but this right is left exclusively to the laws of the state in which is located the right of way attempted to be sought.³⁸ Nor can a federal court, under that act, with its equity powers, use its injunction process so as to effect an equitable condemnation of an easement of a right of way over a railroad along which it has constructed its line under a contract with a prior owner of the railroad whose ownership had been terminated by the foreclosure of a mortgage existing prior to the contract.³⁹

§ 71. Act otherwise considered.

The act does not affect the liability of the telegraph company for damages resulting from the negligence in the transmission or delivering of messages.⁴⁰ It does not embrace the telephone companies,⁴¹ nor does it extend to the installation by a regularly organized telegraph company, of a district telegraph system for the collection and distribution of telegraph messages and for the operation of call boxes, watchmen and police signals, and the like.⁴² By an early act of Congress and supplemental acts thereto subsidized railroad companies, known generally as the Pacific railroads, were granted rights of way over the public domain and were required to construct and operate telegraph lines along their various routes under special pro-

³⁸ *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1; *Postal Tel. Cable Co. v. Cleveland, etc., R. Co.*, 94 Fed. 234; *Postal Tel. Cable Co. v. Southern R. Co.*, 89 Fed. 190; *West. U. Tel. Co. v. Penn. R. Co.*, 123 Fed. (C. C. A.) 33, reversing 120 Fed. 951, and affirming 120 Fed. 362; *Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R. Co.*, 49 La. Ann. 58, 21 So. 183; *Nicoll v. New York, etc., Tel. Co.*, 62 N. J. L. 133, 42 Atl. 583, 72 Am. St. Rep. 666, affirming 62 N. J. L. 156. See, also,

West. U. Tel. Co. v. Ann Arbor R. Co., 178 U. S. 243, 20 S. Ct. Rep. 867, reversing 90 Fed. 379.

³⁹ *West. U. Tel. Co. v. Ann Arbor R. Co.* (C. C. A.), 90 Fed. 379.

⁴⁰ *West. U. Tel. Co. v. Mellon*, 100 Tenn. 429.

⁴¹ *Richmond v. Southern Bell Tel., etc., Co.*, 174 U. S. 761, 19 S. Ct. Rep. 778, affirming 103 Fed. 31.

⁴² *Toledo v. West. U. Tel. Co.*, 46 C. C. A. 111, 107 Fed. 10, 121 Fed. 734.

visions with regard to telegraphic service to be furnished to the government and the public.⁴³

§ 72. State grants.

For the reason that telegraph companies may acquire from the government a right of way over and across public and private property does not prevent the state from making such grants; for we find that most, if not all, of the states have passed laws, giving the right to telegraph and telephone companies, under certain conditions and restrictions, to construct and operate lines upon the public highways.⁴⁴ It will be seen that there is a distinction between a federal and a state grant with respect to the kind of companies to which the grant may be made. In the former, as stated elsewhere the grant can only be made to a telegraph company, but in the latter, it may be made to either or both a telegraph or telephone company. It would require much time and space to set forth all the statutes of the several states on this subject; so we will leave the reader to consult the laws of his own state in regard to this question.

§ 73. On railroad.

In some states these statutes confer upon telegraph and telephone companies the right of using the right of way of a railroad company.⁴⁵ It has been held that under a statute authorizing telegraph companies to construct their lines "along and parallel to any of the railroads of the state," a telegraph company is not authorized to con-

⁴³ U. S. v. Union Pac. R. Co., 160 U. S. 1, 16 S. Ct. Rep. 190, 163 U. S. 710, 16 S. Ct. Rep. 1206; U. S. v. Northern Pac. R. Co., 120 Fed. 546.

⁴⁴ Code of Ala. 1896, §§1244-2490; Code of Tenn. 1896, §1830; Code of Va. 1887, §§1287-1290, construed in Southern Bell Tel., etc., Co. v. Richmond, 103 Fed. 31, 174 U. S. 761; Miss. L. 1886, p. 93, construed in Meridian v. West. U. Tel. Co., 72 Miss. 916, 18 So. 81, 29 L. R. A. 770; Postal Cable Tel. Co. v. Norfolk, etc., R. Co., 88 Va. 920, 14 S. E. 803; Hudson Tel. Co.

v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619; Marshfield v. Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, construing Wis. Rev. Stat., §§1898-1778; State v. Cumberland Tel., etc., Co., 52 La. Ann. 1411, 27 So. 795; State v. Flod, 23 Mo. App. 185; State v. Spokane, 24 Wash. 53, 63 Pac. 1116; West. U. Tel. Co. v. Williams, 86 Va. 696, 11 S. E. 103, 8 L. R. A. 4290, 19 Am. St. Rep. 908.

⁴⁵ Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R. Co., 49 La. Ann. 58, 21 So. 183.

denn a right of way along and upon the right of way of a railroad company; it is only allowed to run in the direction lengthwise of the railroad, alongside and equidistant from it throughout all its parts.⁴⁶ While these statutes are subordinate to the act of Congress on the same subject, yet they may nevertheless be resorted to for condemnation of a right of way along railroads when necessary.⁴⁷

§ 74. Same continued—conditions not to interfere with running trains.

These statutes provided that telegraph lines shall not be constructed along the railroad so as to interfere with travel. If it were not for this condition these companies might, by a multiplication of wires, interfere with the running of trains, and the possible falling of poles would endanger the safety of trains. It has therefore been expressly stated both in the act of Congress and the various state statutes on the subject, that the lines must be so constructed and maintained as not to interfere with travel. They do not state how far they shall be from the railroad, but it is an implied condition on the part of these companies that the lines shall not be so closely erected to the road as to obstruct the operation of the railroad.

§ 75. Same continued—award.

Another condition required of a telegraph or a telephone company before constructing a line of wires along and upon a railroad's right of way, is that the latter must be compensated for the use of its road-bed by either of these companies. While it is very clear that the railroad should be compensated for the use of its easement, since, not to do so, would be against the constitutional guaranty to every property-owner, in that it would be depriving it of its property without due compensation; yet, in a matter of this kind, it is very difficult to determine how much should be awarded. The construction of the line of wires along a railroad will occupy with its poles and cross-pieces thereon, a right of way of the company of some eight or ten feet, but knowing this fact, there is no means of ascertaining the amount of

⁴⁶ *Postal Tel. Co. v. Norfolk, etc., R. Co.*, 88 Va. 920, 14 S. E. 803.

⁴⁷ *Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R., etc., Co.*, 49 La. Ann. 58, 21 So. 183.

damages in money that would be inflicted upon the railroad. The land along the railroad company's right of way may be of a peculiar or particular value for specific purposes, and this fact must be taken into consideration in the awarding of damages to the road, since the telegraph company cannot avail itself of improved conditions without due and proper compensation. There is one fact, however, undisputed: the telegraph company must make compensation proportionately for the cost and expense of the railroad in putting in condition its right of way.⁴⁸ The circumstances in every case are not the same, so each must be considered in the light of its own surroundings and decided on its own peculiar state of facts.

§ 76. Canal—under same statutes.

In some states these statutes grant to telegraph and telephone companies the right to construct their lines upon, or along, by and across canals. Thus, under a Louisiana statute,⁴⁹ the land of the state, though appropriated to the use of a canal may be used by a telephone company along and over the waters of the state, provided that the ordinary use of the company does not interfere with it in any manner, or obstruct in the least the use of it by the state or the plaintiff company.⁵⁰

§ 77. The term "highway" embraces city streets.

These statutes which confer upon telegraph and telephone companies the right to occupy "public highways" of the state, embrace city streets, unless a different intent is clearly indicated,⁵¹ yet it has been held that where the term "public roads" is used in the stat-

⁴⁸ *Postal Cable Tel. Co. v. Morgan's Louisiana, etc., R., etc., Co.*, 21 So. 183, 49 La. Ann. 58, affirming *Postal Tel. Co. v. Louisiana, etc., R. Co.*, 9 So. 119. In the latter case an award of \$50 per mile was allowed.

⁴⁹ No. 24, 1880.

⁵⁰ *State v. Cumberland, etc., Tel. Co.*, 52 La. Ann. 1411, 27 So. 795.

⁵¹ *Abbott v. Duluth*, 104 Fed. 833; *Chamberland v. Iowa Tel. Co.*, 119 Iowa 619, 93 N. W. 596; (City's consent un-

necessary); *East Tenn. Tel. Co. v. Russellville*, 106 Ky. 667; *Duluth v. Duluth Tel. Co.*, 84 Minn. 486, 87 N. W. 1124; *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 53 L. R. A. 175; *Michigan Tel. Co. v. Boston Harbor*, 121 Minn. 512, 83 N. W. 386, 47 L. R. A. 104; *State v. Sheyboygan*, 11 Wis. 23; 86 N. W. 657.

utes, streets of a city are not embraced therein.⁵² The term will also embrace a turnpike,⁵³ but not a railroad or its right of way,⁵⁴ nor will it embrace lands granted for canal purposes.⁵⁵

§ 78. Conditions of grantee.

In the granting by the state to telegraph and telephone companies the right to construct and operate lines of wires across private property, along and upon highways, railroads, and along, across and under navigable waters, there are certain conditions for the welfare and convenience of the public always required of the grantees, for the enjoyment of such right. For instance, in some states, authority is given by statutes to all telegraph companies to erect poles on which to place their wires, on all highways or public roads, by first obtaining the consent, in writing of the county board of the county in which such highway is situated;⁵⁶ and that the posts, arms, insulators and other fixtures of such telegraph or telephone lines be so erected, placed and maintained as not to obstruct or interfere with the ordinary use of such highways, railroads, streets or water; or with the convenience of any land owners more than may be unavoidable;⁵⁷ or change or adjust, when necessary, its system of operating its telephone lines as not to curtail the enjoyment by the public of the best mode of travel and transportation;⁵⁸ or not to interfere with the opening and closing of a drawbridge across a navigable stream⁵⁹ nor obstruct steamers or travels upon the navigable waters. And these companies must always first make compensation for damages and injuries inflicted upon the owners of the fee or right of way,⁶⁰ or they would be taking the property of others without compensation.

⁵² *Nebraska Tel. Co. v. West. Independent Long Distance Tel. Co.*, 95 N. W. 18.

⁵³ *People's Tel., etc., Co. v. Burks, etc., Turnpike Road*, 199 Pa. St. 411, 49 Atl. 284.

⁵⁴ *West. U. Tel. Co. v. Penn. R. Co.*, (C. C. A.) 123 Fed. 33, reversing 120 Fed. 981.

⁵⁵ *State v. Cumberland Tel., etc., Co.*, 52 La. Ann. 141, 27 So. 795.

⁵⁶ *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507.

⁵⁷ *Miss. L.* 1886, p. 93.

⁵⁸ *Cincinnati Incline Plane R. Co. v. Tel. Association*, 48 Ohio St. 390, 29 Am. St. Rep. 559, 12 L. R. A. 534, 27 N. E. 890.

⁵⁹ *Pac. Mut. Tel. Co. v. Chicago, etc., Bridge Co.*, 36 Kan. 113, 12 Pac. 535.

⁶⁰ *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507.

CHAPTER VI.

MUNICIPAL GRANTS.

- § 79. Easement—where vested.
- 80. Same continued—authority—how acquired.
- 81. Same continued—terms and conditions.
- 82. Same continued—unconditional statutes.
- 83. Same continued—city's consent.
- 84. Must petition municipalities.
- 85. Compensation to municipalities.
- 86. Same continued—city control.
- 87. Same continued—charge in nature a rental—decision of point.
- 88. Same continued—not on gross income—effect of.
- 89. Same continued—reasonable charges.
- 90. Termination of franchise to occupy streets.

§ 79. Easement—where vested.

The easement in the highways is vested in the public from which it cannot be divested by anything short of an action instituted by the sovereign power. The public may surrender the rights and privileges which it has therein, but the same must be done by proper proceedings conducted by the sovereign authority; as, without which, it cannot be divested. A non-user or an adverse use will not be considered a surrender of its vested rights.¹ For the same reason, the pub-

¹ Webb v. Dunapolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62; Yolo v. Barny, 79 Cal. 375, 21 Pac. 833, 12 Am. St. Rep. 152; Ralston v. Weston, 46 W. Va. 544, 33 S. E. 326; Lee v. Mound Station, 118 Ill. 304, 8 N. W. 759; Schmidt v. Draper, 137 Ind. 249, 36 N. W. 79; Huddleston v. Hendricks, 52 Ohio St. 460, 40 N. E. 408; Childs v. Nelson, 69 Wis. 125, 33 N. W. 587; Com. v. Moorehead, 118 Pa. St. 344, 12 Atl. 424, 4 Am. St. Rep. 599; Briggs v. Philips, 103 N. Y. 77; St. Vincent Orphan Asylum v. Troy, 76 N. Y. 108, 32 Am. St. Rep. 286; Lainy v. United New Jersey R., etc., Co., 54 N. J. L. 576, 25 Atl.

409, 33 Am. St. Rep. 682; Newsom v. Charles Street Ave. Co., 83 Md. 130, 34 Atl. 360; Almy v. Church, 18 R. I. 182, 26 Atl. 58; Yates v. Warrenton, 84 Va. 337, 4 S. E. 818, 10 Am. St. Rep. 860; Crocker v. Collins, 37 S. C. 327, 15 S. E. 951, 34 Am. St. Rep. 752; Moose v. Carson, 104 N. C. 431, 7 L. R. A. 548n, 10 S. E. 689, 17 Am. St. Rep. 681; Vicksburg v. Marshall, 59 Miss. 563; Louisiana Ice Mfg. Co. v. New Orleans, 43 La. Ann. 217, 9 So. 21; Rabt v. Southern R. Co., 50 S. W. 72; Waterloo v. Union Mill Co., 72 Iowa 437, 34 N. W. 137; Williams v. St. Louis, 120 Mo. 403, 25 S. W. 561.

lie interest in the easement of a highway cannot be changed to a different and additional use without like proceedings. The acts and doings of the public are exercised over by the legislature; ² therefore, the legislature, representing the public, may release the public rights, by vacating the highways; may modify the public use, by granting a right to use them for a horse railroad; or may restrict the public use, by granting a right to erect poles and other obstructions therein.³ What the legislature may thus do it may also delegate to others. Thus, from the earliest history of the laws of the state, authority to vacate highways in county districts has been conferred on special tribunals. The like authority has frequently been conferred on municipalities. No reason appears why such authority, possessed by the legislature may not thus be delegated. But the delegation of such power must plainly appear, either by express grant or by necessary implication.

§ 80. Same continued—authority—how acquired.

It is a fundamental principle of law, that the powers of a municipal corporation in respect to the control of its streets are held in trust for the public benefit, and cannot, unless clearly authorized by a valid legislative enactment, be surrendered or delegated by contract to private persons or other corporations.⁴ Whether or not the right to authorize the use of its streets exists in the municipality in particular cases, is a question of the construction of charters and of legislative provisions in force in the state; ⁵ but the powers usually conferred upon municipal corporations are generally sufficient to authorize the implication that such rights exist. Thus, authority to "license, tax, and regulate" telephone companies and "all their branches of business," given to a city by its charter, carries with it power to grant

² *Polack v. Trustees of San Francisco Orphan Asylum*, 48 Cal. 490; *Meyer v. Village of Teutopolis*, 131 Ill. 552, 22 N. E. 689; *McGee's Appeal*, 114 Pa. St. 470, 8 Atl. 237; *Gray v. Iowa Land Co.*, 26 Iowa 387; *Paul v. Coover*, 24 Pa. St. 207, 64 Am. Dec. 649.

³ *American Rapid Tel. Co. v. Hess*,

125 New York 641, 21 Am. St. Rep. 764, 13 L. R. A. 454n.

⁴ *Chicago, etc., R. Co. v. Quincy*, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 172.

⁵ *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 2 L. R. A. 278n, 9 Am. St. Rep. 370; *Dillon on Municipal Corp.*, (3 Ed.), sec. 89.

to such companies the right to erect poles and wires within the city.⁶ It follows, then, on account of these principles of law, that the extent of power which a municipality has in granting or refusing the right to a telegraph or telephone company to construct a line of wires upon the streets, depends upon the nature of the charter and the laws which are in force. But even where a municipality has such authority, it must be confined to a reasonable exercise thereof, and such authority does not extend to the power to grant to a private citizen the right to construct a line of wires for his own benefit; nor can it grant, under this authority, the right to a telegraph company to so obstruct the streets as to prevent travel⁷ or to interfere with the ancient light.

§ 81. Same continued—terms and conditions.

As a general rule, telegraph and telephone companies are given by statute the right to occupy highways and streets, but it is made the duty and right of each municipality to fix the terms and conditions upon which its own streets may be used. In the first place, in order for such companies to take advantage of and be protected by these statutes, they must be complied with in the manner pointed out by such statutes, otherwise their acts will be prohibited by injunction;⁸ these statutes cannot be enlarged by municipal ordinances.⁹ Thus, where a statute grants the right to these companies to construct a line of wires over and through streets, it has been held that this did not give the city the authority to place the wires underground.¹⁰ An exercise of the right granted by such statutes, delegated to the municipal authority, does not deprive the latter of the police power over its streets;¹¹ and, in order to carry out and main-

⁶ *Herschfield v. Rock Mt. Bell Tel. Co.*, 12 Mont. 102; 2 Dillon Mun. Corp., 724.

⁷ *Shelfields Central U. Tel. Co.*, 36 Fed. 164.

⁸ *Broom v. New Jersey Tel. Co.*, 42 N. J. Eq. 141, 7 Atl. 851; *New York, etc., Tel. Co. v. Township of East Orange*, 42 N. J. Eq., 490, 5 Atl. 641.

⁹ *Chesapeake Tel. Co. v. Mackenzie*, 74

Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690.

¹⁰ *Com. v. Warwick*, 185 Pa. St. 623, 40 Atl. 1016.

¹¹ *West U. Tel. v. Philadelphia*, 21 Am. Eng. Corp. Cas. 40; *American, etc., Tel. Co. v. Hess*, 125 N. Y. 641, 21 Am. St. Rep. 764, 13 L. R. A. 454n; *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107, 49 Am. St. Rep. 183, 27 L. R. A. 514, 39 N. E. 433.

tain the municipal government, a license tax¹² or rental¹³ may be imposed on such companies doing business wholly or partly within the city limits; this right is not affected by the act of Congress from which federal grants are given.¹⁴ The municipality may require these companies to compensate it in other and different ways, for the privilege of constructing their lines over and upon the streets, where the same is used to make the repairs rendered necessary by such additional use to which the streets are used.¹⁵ It has been held that a legislative act or municipal ordinance, authorizing the construction of the line of wires upon the streets, is void if it fails to provide for compensation to abutting owners.¹⁶ But where the municipalities are given the right and duty to fix the terms and conditions upon which their own streets may be used, they cannot defeat the grant of the company's right given by the statute, by either refusing to name the conditions, or by imposing unreasonable restrictions or conditions. Whenever there is a disagreement between the municipality and these companies about some term or condition imposed by the former, there should be and generally is a court in which this disagreement may be settled. It is not only of interest to the municipality and to these companies that all the conditions should be agreed upon as speedily as possible, but it is also of great interest to the public.¹⁷

§ 82. Same continued—unconditional statutes.

It has been seen that the legislature may grant to telegraph and telephone companies the right to occupy city streets upon such companies complying with conditions and restrictions of the city, but the legislative grant may be unconditional; and when such is the case the city cannot impose any conditions or restrictions upon such com-

¹² West. U. Tel. Co. v. Freemont, 44 Am. Eng. Corp. Cas. 470.

¹³ St. Louis v. West. U. Tel. Co., 148 U. S. 92, 13 S. Ct. Rep. 485.

¹⁴ St. Louis v. West. U. Tel. Co., 148 U. S. 92, 13 S. Ct. Rep. 485.

¹⁵ Zanesville v. Zanesville Tel., etc., Co., 64 Ohio St. 67, 59 N. E. 781, 83 Am. St. Rep. 725, 52 L. R. A. 150.

¹⁶ Dawson v. Postal Tel. Co., 68 Miss.

559, 9 So. 356, 24 Am. St. Rep. 290, 12 L. R. A. 864n; Chesapeake, etc., Tel. Co. v. Mackenzie, 74 Md. 36, 18 Atl. 1107, 28 Am. St. Rep. 227; Southern R. Co. v. Southern, etc., Tel. Co., 46 Ga. 43, 12 Am. Rep. 585.

¹⁷ Zanesville v. Zanesville Tel., etc., Co., 64 Ohio St. 67, 59 N. E. 781, 83 Am. St. Rep. 725, 52 L. R. A. 150.

panies, except under the police power; nor, can its officers interfere with the exercise of the companies' privileges.¹⁸ But should the city be without authority to impose reasonable conditions upon these companies—having merely the power to consent or refuse consent—they may, nevertheless, annex certain conditions on them for the right of easement over the streets; and, if the companies acquire an easement in the streets in accordance to said conditions, and occupy them, they cannot afterwards repudiate the conditions.¹⁹ This principle of law is founded on the ground of estoppel and will be closely observed as in all other cases of this nature. The city authority cannot revoke a designation of the streets in which a telegraph company may place their poles, when the company has conformed to the conditions upon which the designation was made, and has expended money in placing poles upon the designated streets.²⁰

§ 83. Same continued—city's consent.

Many of these statutes which gives telegraph and telephone companies the right to construct lines of wires upon the streets of cities provided that this right shall not be exercised without first obtaining either the consent of the council or the board of commissioners. The municipality does not lose control over its streets, and any additional servitude to which it may be placed should be known by, and consented to, by one having supervision over the maintenance of streets. The provisions in these statutes, to the effect that the consent of the municipality shall be first obtained, are mandatory and a company can acquire no right to occupy the streets until such have been obtained.²¹

§ 84. Must petition municipalities.

Another requirement of a telegraph or telephone company necessary to be made before legally and properly acquiring an easement

¹⁸ State v. Flad, 23 Mo. App. 185.

¹⁹ Southern Bell Tel., etc., Co. v. Richmond, 103 Fed. 31, 44 C. C. A. 147.

²⁰ Hudson Tel. Co. v. Meyer, etc., Jersey City, 49 N. J. L. 303, 60 Am. Dec. 619, 8 Atl. 123.

²¹ Southern Bell, etc., Co. v. Richmond, 103 Fed. 31, 44 C. C. A. 147; East Tenn. Tel. Co. v. Anderson Tel. Co., 74 S. W. 218, 24 Ky. L. Rep. 2358, 74 S. W. 218; State v. Spokane, 24

on city streets for its lines, is that it should petition the municipal authority who has the power to make such grants, asking for this privilege: setting out in the petition, in clear and definite language, the street or streets on which it intends to construct said line; the side of the street on which the construction is to be made; the size of the posts; and such other requirements as may be provided for in the statutes. This should be done in order to apprise the commissioners, or the parties who have the authority to grant such rights, of the burdens which they may expect, and the landowner of the burden to which he must submit.²²

§ 85. Compensation to municipality.

After a statute has granted to telegraph and telephone companies the right to construct their lines upon the streets of a municipality the question which next presents itself is, Has the municipality the right to exact compensation of these companies for exercising this privilege? In answering this question, it is necessary to know as to whether or not the city has entire control over the streets; if it should be learned that this be the case and the fee to the streets is in the latter, it may be answered in the affirmative: otherwise not; yet, there seems to be some difference of opinion on the subject. There is no question, in our mind—and yet, as will be later seen, the courts are wholly at sea—but that these companies are an additional burden to the streets, for which the abutting owners should be compensated. It has been held by an eminent text-writer that a municipal corporation, though holding the fee in the streets, has no private property right or interest in them which entitles it to compensation, under the constitution when they are subject to an authorized additional burden of a public nature.²³ But if the city charter or the laws of the state vest in the municipality the entire control over its streets such city may exact of these companies a reasonable compensation for the use of its streets in the nature of rental.²⁴ The municipality must clearly

Wash. 53; *Norshfield v. Wisconsin Tel. Co.*, 102 Wis. 604, 44 L. R. A. 565n; *St. Paul v. Freedy*, 86 Minn. 350, 90 N. W. 781.

²² *Brooms v. New York, etc., Co.*, 8 Cent. Rep. 589, 21 Am. St. Rep. 764.

²³ *Lewis on Eminent Domain*, sec. 119.

²⁴ *St. Louis v. West. U. Tel. Co.*, 149 U. S. 465, 13 S. Ct. Rep. 990.

show that it has this power notwithstanding the fact that the fee is in the city; since if the statute provides that on compliance with the terms by such companies, they may without compensation use so much of the streets as may be reasonably needed for the construction of their lines, an ordinance cannot be passed charging them rent for the use of the streets,²⁵ and yet it may exact so much from these companies as may be necessary to make the repairs rendered necessary by such additional use.²⁶

§ 86. Same continued—city control.

As has been said, where the city has the entire control over its streets, which is seldom the case, it may exact compensation of these companies in the nature of a rental. The leading cases arising on the question came up from the city of St. Louis in which it demanded rental for the use of its streets, and there the court held that such power was vested in the municipality.²⁷ This city is the absolute owner of the fee in its streets, and the charter powers of the city are "self-appointed." The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature; but it formed its own charter under express authority from the people of the state, given in the constitution. Its charter is an organic act—so defined in the constitution—and is to be construed as organic acts are construed. The city is, in a very just sense, an *imperium in imperio*. Its powers are self-appointive, and the reserved control, vesting in the general assembly, does not take away this peculiar feature of its charter. The courts considering the city as absolute and uncontrolled proprietor of its streets, held that rent might be exacted from telegraph companies in the nature of toll—a demand of proprietorship. The peculiar nature of the charter of St. Louis and the manner in which it was acquired, make these cases of much

²⁵ *Hodges v. West. U. Tel. Co.*, 18 So. 84, 72 Miss. 910, 29 L. R. A. 770.

²⁶ *Zanesville v. Zanesville, Tel., etc.*, Co., 64 Ohio. St. 67, 59 N. E. 781, 83 Am. St. Rep. 725, 52 L. R. A. 150. See also *Chicago, etc., R. Co. v. Chicago*, 176 Ill. 253, 72 N. E. 880, 68 Am. St. Rep. 188, 66 L. R. A. 959.

²⁷ *St. Louis v. West. U. Tel. Co.*, 149 U. S. 465, 13 S. Ct. Rep. 990; *Postal Tel. Cable Co. v. Baltimore*, 79 Md. 502, 29 Atl. 819, affirmed by 156 U. S. 210, 15 S. Ct. Rep. 356; *Harrisburg v. Penn. Tel. Co.*, 15 Pa. St. Ct. 578, 3 Pa. Dist. 815.

interest and often quoted, and yet we are seldom confronted with a similar state of affairs for the reason that few similar city charters are to be found.

§ 87. Same continued—charge in nature a rental—decision of point.

The compensation exacted of these companies by cities for the use of their streets, is in the nature of a rental and not a tax;²⁸ nor as a consideration for the privilege of using the streets.²⁹ It gives us much pleasure to quote at some length Judge Brewer's opinion on this subject when he very ably said, that; "Clearly, this is no privilege or license tax. The amount to be paid is not graduated by the amount of business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship.'³⁰ If, instead of occupying the streets and public places with the telegraph poles, the company should do what it may rightfully do, purchase grounds in the various blocks from private individuals, and to such grounds remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. Supposing the city of St. Louis should find its city hall too small for its purposes, or too far removed from the center of business, and should purchase or build another more satisfactory in this respect, it would not thereafter be forced to let the old remain vacant or to immediately sell it, but might derive revenue by renting its various rooms. Would an ordinance fixing the price at which those rooms could be occupied be in any sense one imposing a tax?"³¹

²⁸ *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 S. Ct. Rep. 485; *Meridian v. West. U. Tel. Co.*, 72 Miss. 910, 18 So. 84, 29 L. R. A. 770.

²⁹ *New Orleans v. Great Southern*

Tel., etc., Co., 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533.

³⁰ *State Freight Tax Case*, 15 Wall. 232, 278.

³¹ *St. Louis v. West. U. Tel. Co.*, 149 U. S. 465, 13 S. Ct. Rep. 990.

§ 88. Same continued—not on gross income—effect of.

"Nor is the character of the charge changed," as he further observes, "by reason of the fact that it is not imposed upon such telegraph companies as by ordinance are taxed on their gross income for city purposes. In the illustration just made in respect to a city hall, suppose that the city, in its ordinance fixing a price for the use of rooms, should permit persons who pay a certain amount of taxes to occupy a portion of the building free of rent; that would not make the charge upon others for their use of rooms a tax. Whatever the reasons may have been for exempting certain classes of companies from this charge, such exemption does not change the character of the charge, or make that a tax which would otherwise be a matter of rental. Whether the city has power to collect rental for the use of streets and public places, or whether, if it has, the charge as here made is excessive, are questions entirely distinct. That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent. While we think that the circuit court erred in its conclusions as to the character of this charge, it does not follow therefrom that the judgment should be reversed, and a judgment entered in favor of the city. Other questions are presented which compel the examination."³²

§ 89. Same continued—reasonable charges.

As to the reasonableness of an ordinance which charges five dollars a pole per annum the same court said, that; "Prima facie, an ordinance like that is reasonable. The court cannot assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void; for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable. If, within a few blocks of Wall street, New York, the telegraph company should place on the public streets 1,500 of the large telegraph poles, it would

³² *St. Louis v. West. U. Tel. Co.*, 149 U. S. 465, 13 S. Ct. Rep. 990.

seem as though no court could declare that five dollars a pole was an excessive annual rental for the ground so exclusively appropriated: while, on the other hand, a charge for a like number of poles in a small village, where space is abundant and land of little value, would be manifestly unreasonable, and might be so excessive as to be void. Indeed, it may be observed, in line with thoughts heretofore expressed, that this charge is one in the nature of rental; that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated: and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open to the courts and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city.³³

§ 90. Termination of franchise to occupy streets.

A municipal ordinance which grants to a company authority to construct and maintain telephone lines on the streets of a city, without any limitation as to time, and for a consideration therein named, is, when accepted and acted upon by the grantee, a contract with the city which cannot thereafter be abolished or altered in its essential terms without the consent of the grantee.³⁴ The franchise or right to use the streets is an irrevocable contract and cannot be revoked without just cause³⁵ and one which the city cannot by indirection or otherwise arbitrarily declare forfeited;³⁶ nor, can it remove the company's lines arbitrarily and without notice,³⁷ upon the expiration of the

³³ *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 S. Ct. Rep. 485.

³⁴ *New Orleans v. Great Southern Tel., etc., Co.*, 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502; *Indianapolis v. Consumer's Gas Trust Co.*, 140 Ind. 107, 39 N. E. 133, 49 Am. St. Rep. 183, 27 L. R. A. 514; *Williams v. Citizen's R. Co.*, 130 Ind. 71, 29 N. E. 408, 30 Am. St. Rep. 201, 15 L. R. A. 64; *Greg-*

stere v. Chicago, 145 Ill. 451, 36 Am. St. Rep. 496, 34 N. E. 426.

³⁵ *West. U. Tel. Co. v. Toledo*, 103 Fed. 746. See, also, *Seaboard Tel., etc., Co. v. Kearney*, 68 N. Y. App. Div. 283.

³⁶ *Abbott v. Duluth*, 104 Fed. 833; *Old Colony Trust Co. v. Wichita*, 123 Fed. 762.

³⁷ *Mutual U. Tel. Co. v. Chicago*, 16 Fed. 309.

right by lapse of the stipulated period. When the company's stipulated time has expired for the use of the streets, it has no right to continue the said use without the consent of the city, and should it attempt so to do, the city may enjoin it from further use.³⁸ And it has been held that where the right of the company to use the streets is unsettled, the company cannot have a preliminary injunction to restrain the removal of its poles by the municipality.³⁹

³⁸ *Mut. U. Tel. Co. v. Chicago*, 16 Fed. 309.

³⁹ *New York, etc., Co. v. East Orange Tp.*, 42 N. J. Eq. 490, 8 Atl. 289.

CHAPTER VII.

CONSTRUCTION AND MAINTENANCE OF TELEGRAPH AND TELEPHONE LINES.

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§ 91. In streets.

The right to construct telegraph and telephone lines upon the streets must be derived from an express grant of the legislature.¹ It cannot exist by implication only.² The power to make such grants over highways, such as are post-roads,³ rests in Congress, but such grants over all other highways in a state, including city streets, rests ultimately in the legislature.⁴ A municipality is a part of the government and exercises such powers only as are expressly granted in its charter, or such as are necessarily implied to carry out those expressly given.⁵ Legislative powers may be and are delegated to these municipalities;⁶ and among these, one is the power to grant to telephone companies, as has already been discussed,* the right to the use of its streets for telephonic purposes. The rights and powers of a municipality are derived from the legislature as those of any other corporation; however, there is no contract existing between the state and the municipality which would prevent the state from repealing, amending, changing, or even annulling the latter's charter, and thereby infringing upon the contractual right. For the reason that a city is only a part of the government, created for the purpose of assisting in the carrying on of the governmental affairs, its charter may be altered, changed or annulled, in order to meet the demands of the government and the purpose for which it was created. The city may pass ordinances for the betterment of its internal society and business, but these must be consistent with its charter and

¹ *Broome v. New Jersey Tel. Co.*, 42 N. J. Eq. 141, 7 Atl. 851; *New York and New Jersey Tel. Co. v. Township of East Orange*, 42 Ind. 490, 8 N. E. 289; *Domestic Tel., etc., Co. v. Newark*, 16 Am. St. Rep. 293.

² *Atty.-Gen. v. United Kingdom Electric Tel. Co.*, 30 Beav. 287; *Reg. v. United Kingdom Electric Tel. Co.*, 9 Cox. C. C. 174.

³ See Federal Grants—chapter thereon.

⁴ *Abbott v. Duluth*, 104 Fed. 833 (construing Laws of Minn. 1860, ch. 12, § 11); *Irwin v. Great Southern Tel. Co.* 37 La. Ann. 63; *Hudson Tel. Co. v.*

Jersey City, 49 N. J. 303, 8 Atl. 123, 60 Am. Rep. 619; *Barhite v. Home Tel. Co.*, 50 N. Y. App. Div. 25.

* *Whiting v. West Point*, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860n, 29 Am. St. Rep. 750; *Wilson v. Beyers*, 5 Wash. 303, 34 Am. St. Rep. 858; *South Covington, etc., R. Co., v. Berry*, 93 Ky. 43, 15 L. R. A. 604n, 40 Am. St. Rep. 161; *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. Rep. 230; *Chaupier v. Greencastle*, 138 Ind. 339, 46 Am. St. Rep. 390, 35 N. E. 14, 25 L. R. A., 768n.

⁵ *City v. Parker*, 114 Ala. 118, 21 So. 452, 62 Am. St. Rep. 95.

⁶ See Chapter 6.

the laws of the state. This is one of the delegated powers and may be exercised in any manner not inconsistent with the laws of the land. For instance, the manner in which the streets are kept and maintained is left partly to city control with the consent of the state; and, yet the streets do not belong to the municipality nor to the citizens therein,⁷ but they belong to the public. They are public thoroughfares over and along which all citizens have the same right to travel; and the state should and does therefore have them under the same control and general supervision as it has other public highways. The state has such control over the streets and public highways as to prevent them from being obstructed or used in any manner which would incommode public travel. It may grant the license to any public enterprise, which has an interest to perform toward the government to use the streets for the purpose of carrying on its business; but there must not be such a use of the license as would interfere with public travel. For instance if the streets are so thickly planted with telephone poles and in such a manner as to endanger public travel, they may be required to be moved; or because of the noise and danger of a multiplicity of wires in a large city, they may be required to be placed under ground.⁸

§ 92. State control.

Statutes authorizing a corporation to construct lines of telegraph along and upon the public streets, by the erection of the necessary fixtures, including posts, piers, and abutments for maintaining wires, do not grant any interest in such streets.⁹ At most, they only confer a license to enter thereon for the purposes named, and merely determine that one of the purposes for which the streets may be used is the erection of poles and the stringing of wires for the business of telegraphing; and that such use is a public one, not inconsistent with the use of the street for general street purposes.¹⁰ Such grants do not abdicate its power over the public streets, nor in any way curtail

⁷See note to *McCormick v. District of Columbia*, 54 Am. Rep. 291.

⁸*American, etc., Tel. Co. v. Hess*, 125 New York 641, 21 Am. St. Rep. 764. 13 L. R. A., 454n.

⁹*American, etc., Tel. Co. v. Hess*, 125 N. Y. 641, 21 Am. St. Rep. 764, 13 L. R. A. 454n.

¹⁰*Id.*

its police power to be exercised for the general welfare of the public; and if the poles and wires become a serious obstruction and nuisance in the streets, the legislature may take such action and make such provisions by law as are needful to remove the nuisance and restore the utility of the streets for public purposes.¹¹

§ 93. Right may be delegated to city.

The power to grant licenses to telephone companies to construct and maintain their lines in municipalities may be delegated to the latter; but this power must be expressly granted by the state. The right, then, virtually comes direct from the state, and the municipal authority only gives permission to use the same; for the latter may attempt to exercise the right to grant such license and yet the state may prevent the same from being enjoyed.¹² The municipal authority has no power to enlarge upon the rights delegated; ¹³ otherwise they would be exercising the same power in this respect as that of the legislature, which it cannot do, since the power to control streets and public highways rest ultimately in the latter.

§ 94. City control.

While the grant to telephone companies to use the streets for telephonic purposes is derived from the state—which also partly controls the manner of their use—the city may control the erection, construction and maintenance of these companies' lines as shall best secure the public safety, convenience and freedom in the use of the streets. The design is to invest telegraph companies with the right to use the streets of an incorporated town for the purpose of erecting their poles therein, subject to such municipal control as shall be necessary to secure the public safety, convenience and freedom in the use of the streets.¹⁴ Thus, municipal authorities may say what streets shall be used; at what points in the streets the poles shall be erected; and how they shall be planted and secured, but they have no power to lay an embargo. They may adopt regulations fixing the elevation at which

¹¹ *Id.*

¹² *Montgomery v. Parker*, 21 So. 452.

¹³ *Chesapeake, etc., Tel. Co. v. Mack-*

enzie, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690.

¹⁴ *Barber v. Rappbury*, 41 Allen 320; *Angell on Highways*, § 223.

telegraph wires shall cross the streets; and they may also prescribe such other precautions as may be reasonably necessary to the safety of travel. They have the right to regulate but not to interdict, and their regulation to be valid must be reasonable and fair.¹⁵

§ 95. Unauthorized use—nuisances.

Legislative sanction directly given or indirectly conferred through proper municipal action is necessary to authorize the use of streets for the posts of a telephone company. If such posts be erected within the limits of a street or highway without such sanction, they are nuisances;¹⁶ but are otherwise when such rights are sanctioned by statute.¹⁷ When the right is conferred by the concurrent legislative and municipal authorities to a telephone company to erect its poles and suspend its wires in and over the streets of a city, this fact will protect such company from being treated as a trespasser, and its work from being declared a nuisance; that is, if they are so constructed as not to obstruct or interfere with the use of the streets by the public or the owner's right of ingress or egress to and from his abutting property.¹⁸

§ 96. Additional servitude—in general.

While the legislature has authority, in the exercise of the police power, to determine as to whether the erection of poles and stringing of wires of a telephone corporation along and upon streets and public highways is a public use, not inconsistent with the uses to which such highways are adopted, yet the difficult and perplexing question which has so often puzzled the courts is, whether or not the legislature may authorize the use of streets and highways for such purposes, without providing for the adjoining landowner to be compensated therefor. In other words, whether or not, the erection of poles, guys, abut-

¹⁵ American U. Tel. Co. v. Town of Harrison, 31 N. J. Eq. 627.

¹⁶ Regina v. United Kingdom Electric Tel. Co., 31 L. J. M. C. 156, 2 Best & S. 647, 9 Cox. C. C. 174; People v. Mut. Tel. Co., 64, How. Pr. 120; Grove v. Fort Wayne, 45 Ind. 429, 15 Am. Rep. 262.

¹⁷ Chesapeake, etc., Tel. Co. v. Mackenzie, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690.

¹⁸ Southern Bell Tel. Co. v. Francis, 109 Ala. 224, 55 Am. St. Rep. 930, 19 So. L., 31 L. R. A. 193.

ments and the stringing of wires of a telephone company upon and along streets and highways, by authority of the state, is a different use than that of a public easement for travel—and that for which it was acquired from the public, in whatever manner as that by the exercise of the power of eminent domain, by prescription, by dedication or by grant—thereby creating an additional servitude to the easement, and for which the original grantor or the party in whom the fee is held or the adjoining lot or landowner is entitled to compensation. This question is by no means settled by the courts, as some hold—and that by good reason—that the construction of a line of these companies upon the highways is not an additional servitude of the easement originally granted and thereby entitling the land owner to additional compensation; while equally as many, if not more of the courts, of later setting, have held otherwise. It will now be our pleasure to discuss at some length both sides of this question, giving as briefly as possible the reasons and opinions presented by the authorities on either, and then harmonizing as nearly as it is in our power these differences.

§ 97. Taking of property for public use—what is.

In discussing this question, it might be well, first, to say a few words as to what is understood by taking property for public use as comprehended by the constitution when it declares that no property shall be taken for public use without first compensating the owner thereof. It may be stated as a general principle—as was very ably observed by an eminent writer¹⁹—that when the lawful, rights of an individual to the possession, use, and enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto*, taken for public use. In early times it was held that property could be deemed to be taken, within the meaning of a constitutional provision that private property should not be taken for public purposes without just compensation, only when the owner was wholly deprived of its possession, use and occupation. But a more just and liberal doctrine has been long since firmly established. An actual physical taking of

¹⁹ Lewis on Eminent Domain, § 56
Groves v. Rowell, 10 N. J. Eq. 211.

the property is not necessary to entitle its owner to compensation. A man's property may be taken within the meaning of this constitutional provision, although his title and possession remains undisturbed. To deprive him of the ordinary beneficial use and enjoyment of his property is, in law equivalent to the taking of it, and as much a taking as though the property itself were actually taken,²⁰ yet in order for him to be able to enforce this right, his property must be directly encroached upon.²¹

§ 98. Same continued—illustrations.

The following cases may be cited as being such as fall under this constitutional provision whereby additional servitude is placed on the easement for which the landowner should be compensated: The appropriation of a country highway to the use of a steam railroad is undoubtedly the imposition of a new servitude, and amounts to the taking of the property of an abutting owner, to whom additional compensation must be made.²² Where the fee of the street of a city is in the abutting owner, and not in the city,²³ the construction of a railroad, for the purpose of transferring freight cars from the terminals of one railroad to another²⁴ and not regarded merely as an extension of the ordinary uses to which the streets have been dedicated,²⁵ is regarded as an imposition of a new servitude, for which

²⁰ Lewis on Eminent Domain. § 56; Tiedeman on Limit of Police Power, 397; Cooley on Const. Limit. (6 Ed.). 670; Hooker v. New Home & N. Co., 14 Conn. 146, 36 Am. Dec. 477; Rigmy v. City of Chicago, 102, Ill. 64; Boston and Rapbury Mill Corporation v. Newman, 12 Pick. 467, 23 Am. Dec. 622; Grand Rapids B. Co. v. Jarvis, 30 Mich. 308; Asaley v. Port Huron, 35 Id. 296. 24 Am. Rep. 552; West Orange v. Field, 37 N. J. Eq. 600, 45 Am. Rep. 670; Seifert v. City of Brooklyn, 101 N. Y. 136, 54 Am. Rep. 664.

²¹ Kenneth Petition 24, N. H. 139; People v. Supervisors of Ouida County, 19 Wend. 102.

²² Cooley on Const. Limit. (6 Ed.). 683.

²³ Carli v. Stillwater St. R., etc., Tel. Co., 28 Minn. 373.

²⁴ Carli v. Stillwater St. R., etc., Tel. Co., 28 Minn. 373.

²⁵ Carson v. Central R. Co., 35 Cal. 325; Market Street R. Co. v. Central R. Co., 57 Cal. 583; Elliott v. Fair Haven, etc., R. Co., 32 Conn. 579; Savannah, etc., R. Co. v. Mayor, etc., of Savannah, 45 Ga. 602; Brown v. Duplessis, 14 La. Ann. 842; Briggs v. Lewiston, etc., Co., 79 Me. 363, 10 Atl. 47; Peddicord v. Baltimore, etc., R. Co., 34 Md. 463; Hess v. Baltimore, etc., R. Co., 52 Md. 242, 36 Am. Rep. 371;

compensation must be made to the owner.²⁶ Land taken for a street cannot be appropriated as a site for a public pound or jail without making compensation to the abutting owner;²⁷ nor, for a market house;²⁸ nor, for a house in which to confine tramps.²⁹

§ 99. When dedicated for street purposes—not an imposition.

Whenever land is taken or dedicated for a city street, it is undoubtedly appropriated for all the ordinary and usual purposes of such a street; it has been held therefore that sewers may be constructed in a street and gas and water pipes may be laid in it for the purpose of supplying the inhabitants with water and gas.³⁰ But the laying of such pipes in an ordinary country road is the imposition of an additional servitude, and compensation must, therefore, be made to the abutting owner;³¹ this, therefore, leads us to discuss briefly the difference between a city street and a public highway—as is commonly understood—with respect to what constitutes an additional servitude on each.

§ 100. The different uses to which streets and highways may be put.

The uses to which streets in a city may be put are greater and more numerous than those of an ordinary road or highway in the country. With reference to the latter all that the public acquires is the easement of passage and its incidents; and hence, the owner of the soil parts with this use only, retaining the soil: by virtue of this owner-

Hinchman v. Patterson, etc., R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252; *Mahody v. Bushwick R. Co.*, 91 N. Y. 148, 43 Am. Rep. 661.

²⁶ *Southern Pac. R. Co. v. Rud*, 41 Cal. 256; *Jurley v. Union Branch R. Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Indianapolis, etc., R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Elizabeth, etc., R. Co. v. Cowles*, 10 Bush 382, 19 Am. Rep. 67; *Williams v. N. Y. Central R. Co.*, 16 N. Y. 97, 69 Am. Dec.

651; *Ford v. Chicago, etc., R. Co.*, 14 Wis. 609, 80 Am. Dec. 791.

²⁷ *State v. Mayor, etc., of Mobile*, 5 Part. 279, 30 Am. Dec. 564.

²⁸ *State v. Laverack*, 34 N. J. L. 201.

²⁹ *Winchester v. Capron*, 63 N. H. 605, 4 Atl. 795.

³⁰ *Croake v. Flatbush, etc., Co.* 29 Hun. 245; *State v. Laverack*, 34 N. J. L. 201.

³¹ *Bloomfield G. L. Co. v. Calkins*, 62 N. Y. 386; *Sternberg's Appeal*, 111 Pa. St. 35, 2 Atl. 105, 56 Am. Rep. 246.

ship he is entitled, except for the purposes of repair, to the earth, timber, and grass growing thereon, and to all minerals, quarries, and springs below the surface. But with respect to the streets in populous places, the public convenience requires more than the mere right of way over and upon them. They may need to be graded, and therefore the municipal authorities may not only change the surface, but cut down trees and dig up the earth; they may use them in improving the street; and they may make culverts, drains and sewers upon or under the surface. Pipes may also be laid under the surface when required by the various agencies adopted in civilized life, such as water, gas, electricity, steam and other things capable of that mode of distribution.³²

§ 101. Cases holding not entitled to compensation.

In consideration of the fact that many of the state courts have differed widely on this subject—the question being *res intergra* in some—we have deemed it proper to set forth as briefly as possible some of the most important opinions of the different courts in order that the reader may himself see the ground whereon the great legal thinkers have used their reason. While we are aware that it is not usual for a writer to quote at any length court opinions, yet we feel by adopting this method, all who may peruse this work may be thrown in closer touch with the deep and profound judicial reasoners of our country and those who have arrived at different conclusions after incessant and untiring research. In accordance to such method we shall first take up the cases wherein it has been held that the construction of telegraph and telephone lines upon a street or public highway does not constitute an additional burden to the easement and thereby entitle the abutting landowner to additional compensation.

³² 2 Dillon, Munc. Corp., §§ 656, 688; Chesapeake, etc., Tel. Co. v. Mackenzie, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690. For the reason that the uses to which streets and highways may be put, the following cases hold that a telephone line on a highway is not an additional servitude: McCann v. Johnson County Tel. Co., 69 Kan. 210, 76

Pac. 879, 66 L. R. A. 171; Cumb. Tel. Co. v. Avritt, 85 S. W. (Ky.), 204; Cates v. Northwestern Tel. Ex. Co., 60 Minn. 539, 51 Am. St. Rep. 343, 63 N. W. 111, 28 L. R. A. 310; Luther v. Bridgeman, 50 S. E. (W. Va.) 40. But as holding to the contrary effect, see Anderson v. Delhi, etc., Tel. Co., 66 App. Div. 89, 86 N. Y. Supp. 771.

§ 102. Same continued—opinions.

Judge Mitchell of the Minnesota court, while considering this subject and the nature and extent of the public easement in a highway, has this to say: "If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society, the conception of a highway was merely a footpath; in a slightly more advanced state, it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals—constituting, respectively, the "iter," the "actus," and the "via" of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence, it has become settled that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired and are more onerous to him than those then in use It is now universally conceded that urban highways may be used for constructing sewers and laying pipes for the transmission of gas, water, and the like for public use. . . . As a matter of fact, most of these uses were unknown when the public easement was acquired in many of the streets in the older cities. . . . In our judgment, public highways, whether urban or rural, are designed as avenues of communication; and, if the original conception of a highway was limited to travel and transportation of property in movable vehicles, it was because these were the only modes of communication then known; that as civilization advances, and new and improved methods of communication and transportation are developed, these are all in aid of and within the general purpose for which highways are designed. Whether it be travel, the transportation of persons and property, or the transmission of intelligence and whether accom-

plished by old methods or by new ones they are all included within the public "highway easement," and impose no additional servitude on the land, provided they are not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, and provided they do not unreasonably impair the special easement of abutting owners in the streets for purposes of access, light, and air."³³

§ 103. Same continued—new use of the easement.

The courts of Missouri uniformly hold that the construction of telegraph and telephone wires along and upon the streets and public highways, is not a new and additional servitude thereon, but is a new use of the easement to which these highways may be put.³⁴ One of the decisions³⁵ in that state was based on the following reasons: "These streets are required by the public to promote trade and facilitate communications in the daily transaction of business between the citizens of one part of the city with those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point, he is entitled to use the street, either on foot, on horseback, or in a carriage, or other vehicle, in bearing the message. The defendants in this case propose to use the streets by making the telephone poles and wires the messenger to bear such communications instantaneously and with more dispatch than any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen or carriages. If a thousand messages were daily transmitted by means of telephone poles, wires and other appliances used in telephoning, the street through these means would serve

³³Cates v. Northwestern Tel., etc., Co. 60 Minn. 539, 57 Am. St. Rep. 544, 63 N. W. 111, 28 L. R. A. 310.

³⁴Gay v. Mut. U. Tel. Co., 12 Mo. App. 485; Julia Bldg. Assn. v. Bell

Tel. Co., 88 Mo. 258, 57 Am. Rep. 398; St. Louis v. Bell Tel. Co., 96 Mo. 623, 9 Am. St. Rep. 370.

³⁵Julia Bldg. Assn. v. Bell Tel. Co., above cited.

the same purpose, which would otherwise require the use either by a thousand footmen, horsemen or carriages to effectuate the same purpose. In this view of it the erection of telephone poles and wires for the transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman or carriage. If it be true, as laid down by the authorities herein cited, that when the public acquires the right to a street, either by dedication, grant or communication, the municipality has power to appropriate it not only to such uses as are common and in vogue at the time of its acquisition, but also to such new uses as advanced civilization may suggest, as conducive to the public good, the conclusion is inevitable that the use of Sixth street in the manner and for the purpose proposed is allowable, for it cannot with any show of reason be denied, that the means these appliances would afford for the instantaneous transmission of communications for the transaction of business, without resorting to the slower and common methods of bearing them, would be conducive to the public good, and make the street by these means serve one of the chief purposes for which it was dedicated. But it is argued that the erection of two telephone poles, each eighteen inches at the bottom with a gradual taper to the top, would obstruct the street, and deny to the public the complete and unrestricted use of the street. This argument, I think is more specious than sound. It is true that to the extent of the space of eighteen inches each of the poles proposed to be erected would be an obstruction, but the same could be said of lamp-posts erected on the streets of a city, the necessities of which might require its streets to be lighted with oil, gas or electric lights; and yet no one would be heard to complain that the lamp-posts constituted such an obstruction or impediment to the free use of the streets as to demand their removal. . . . If the conclusions announced in the foregoing part of this opinion, that all the uses to which a street may properly be devoted are to be regarded as permitted by and included in the original appropriation or dedication of the street, and that the erection and maintenance of telephone poles as proposed is one of these uses, and that in digging holes through the stone slabs and stone walks in which to plant them, there is no taking of private property of the

abutting lotowner entitling him to compensation, are correct it would seem logically to follow that damages resulting from such use need not be compensated for. If, by reason of the dedication the public have the right to apply the private property of the plaintiff to the use proposed, without his being entitled to compensation, how can it be that it becomes entitled to compensation for damages, following as an incident from an act which the dedicator by his dedication has authorized to be done? If the dedication of the street is sufficiently operative to allow private property in the soil of the street to be actually invaded, and physically taken for a street use without compensation, why is it not sufficiently operative, if in such taking damages ensue, to relieve the taker from the payment of such damages? If, by dedicating property for a street, the dedicator gives up his right to compensation for the uses included in the dedication, how can it be said that he does not also give up his right to compensation for damages to adjacent property not taken, resulting from the application of the street to use which by his dedication he authorized it to be put?"

§ 104. Same continued—upholding same.

It has been held by other courts that the above rule was law, and that the legislature might authorize the construction of lines of these companies upon the highways without compensating the abutting landowner.³⁶ The court in one of these cases, said: "When the land was taken for a highway, that which was taken was not merely the privilege of traveling over it in the then known vehicles, or using it in the then known methods for either the conveyance of property or transmission of intelligence. . . . The discovery of the telegraph developed a new and valuable mode of communicating intel-

³⁶ *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7. See also *Hewett v. West*, U. Tel. Co., 4 Mackay (D. C.) 424; *Magee v. Overshiner*, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L. R. A. 379; *Irwin v. Great Southern Tel. Co.*, 37 La. Ann. 63; *Boston v. Richardson*, 13 Allen (Mass.) 160; *People v. Eaton*, 100 Mich. 208, 59 N.

W. 145, 24 L. R. A. 721n; Compare *Williams v. Erie Tel. Co.*, 37 Minn. 347; *Gay v. Mut. U. Tel. Co.*, 12 Mo. 491; *State v. St. Louis, etc., R. Co.*, 86 Mo. 288; *Hershfield v. Rocky Mt. Bell Tel. Co.*, 12 Mont. 102; *Kirby v. Citizens' Tel. Co.*, 97 N. W. 3; *Patton v. Chattanooga*, 108 Tenn. 197.

ligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-box or the mail-coach. . . . We are therefore of the opinion that the use of a portion of a highway for the public use of companies organized under the laws of the state for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has been permitted by the legislature, is a public use similar to that for which the highway was originally taken, or to which it was originally devoted and that the owner of the fee is entitled to no further compensation. . . . That it was the intent of the statute to grant to those corporations, formed under the general incorporation laws for the purpose of transmitting intelligence by electricity, the right to construct lines of telegraph upon and along highways and public roads, upon the locations assigned them by the officers of the municipalities wherein such ways are situated, cannot be doubted. . . . There remains the inquiry whether there is any objection to the statute because it does not provide a sufficient remedy for the owners of the property near to or adjoining the way, who may be incidentally injured by the structures which the telegraph companies may have been permitted to erect along the line of the highway and within its limits. . . . The only compensation to which such owner is entitled is that which the legislature deems just, when it permits the erection of these structures. The legislature may provide for compensation to the adjoining owners, but without such provision there can be no legal claim to it, as the use of the highway is a lawful one."

§ 105. The ground upon which these cases are sustained.

In reviewing these cases in which it is held that the abutting land-owner should not have additional compensation for the construction of a line of telephone along and upon the easement, it will clearly be seen that the ground upon which such opinions are based is, that they are only a new method of enjoying an old existing use, and one actually in the minds of the parties at the time the easement was acquired.³⁷ Some of the authorities, reaching the same conclusion,

³⁷ *Echols v. Evansville St. R. Co.*, 78 Ind. 261; *R. Co. v. Whiting, etc., R. Co.*, 139 Ind. 297; 28 N. E. 604; 26 L. R. A.

treat the uses of streets, arising from dedication or condemnation, as expansive, and not confined to uses already permitted, but, as civilization advances admitting new uses.³⁸ "When land is taken," as was ably said, "or dedicated for a town street, it is unquestionably appropriated for all ordinary purposes for a town street, not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run on a ground track; and the preparation of important streets in large cities for their use is not only a frequent necessity which must be supposed to have been contemplated but it is almost as much a matter of course as the grading and paving."³⁹ "When these lands were taken or granted for public highways, they were not taken or granted for such use only as might then be expected to be made of them, by the common method of travel then known, or for the transmission of intelligence by the only methods then in use, but for such methods as the improvements of the country, or the discoveries of future times, might demand."⁴⁰ "The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach. It is a newer-discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out."⁴¹

§ 106. Same continued—not things of motion.

A reason given why they are considered an additional servitude to the highways, is, that given by some courts which held that the

³⁸ 47 Am. St. Rep. 264; Lockhart v. Craig Street R. Co., 139 Pa. St. 419, 21 Atl. 26; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007.

³⁹ Angeil and Ames on Corp., §312; Julia Bldg. Assn. v. Bell Tel. Co., 88 Mo. 258, 57 Am. Rep. 398; Cates v. Northwestern Tel., etc., Co., 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51

Am. St. Rep. 543; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007.

⁴⁰ Elliott on Roads and Streets, p. 529, approving Cooley's Const. Limit., 556.

⁴¹ People v. Eaton, 100 Mich. 208, 24 L. R. A. 721n, 59 N. W. 145.

⁴² Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7.

poles are not in motion as are ordinary instruments of travel, but this idea was refuted by the following case: "It is said that the primary law of the street is motion. It is true, motion the law of the street, in the sense that the person or thing to be transmitted or transported must move; but it is not true in the sense that the medium or agency by or through which it is conveyed or transmitted must move. Pipes laid for the transmission of water, gas, and steam are immovable. So are the tracks of street railway, also the poles and wires of the trolley system. And it can make no difference in principle whether the immovable structure is on, under, or above the surface of the ground, for the rights of the owner of the fee are the same in either case. Subject only to the public easement for highway purposes, he remains the owner of the land upward and downward indefinitely. If the transmission of intelligence by telegraph or telephone is not included in the public easement in a highway, it would be equally an invasion of his rights of property, even if the wires were placed under the ground. If an immovable structure in a highway constitutes an additional servitude, it is not merely because it is immovable, but because it unreasonably interferes with the general use of the street by the public, or because it unreasonably impairs the special easement of abutting owners."⁴² "Poles and wires for electric lighting have been admitted as a proper use, on the ground that the streets are lighted and their general uses thereby made safer and more expeditious. Incidentally, the same use has been employed for supplying light to public, business, and private houses. Sewers have been admitted as not constituting an additional servitude because they afforded a means of drainage for the streets, although one use was in carrying the waste from the building of citizens. Gas mains and poles were admitted in like manner as electric lighting systems and for like uses. They were always deemed to constitute a beneficial use of the streets as in some degree aiding in the means or opportunities for conducting the affairs of the inhabitants, and in facilitating the communication indispensable to such affairs."⁴³

⁴²Cates v. Northwestern, etc., Tel. Co., 60 Minn. 539, 51 Am. St. Rep. 546, 28 L. R. A. 310, 63 N. W. 111.

⁴³Magsee v. Overshimer, 150 Ind. 127, 65 Am. St. Rep. 360, 49 N. E. 459, 40 L. R. A. 370.

§ 107. Contrary view—additional servitude—so held.

While the reasoning, to the effect that telegraph and telephone lines constructed upon streets and country highways create no additional servitude thereon, is very strong, profound and apparently uncontrovertible, yet the weight of opinion—and that more recently promulgated—holds that they do create a different use of the easement than that contemplated by the parties at the time the public acquired this right and thereby entitling the abutting landowner to be additionally compensated.⁴⁴ In discussing this side of the point at issue, we shall first deal with the subject when the title to the fee of the easement is in the abutting lotowner or land owner; second, when the fee is in the public; and third, when the fee is in a third party. And while discussing each of these subordinate subjects, it

United States.—Pac. Postal Tel. Cable Co. v. Irwin, 49 Fed. 113; *Kester v. West. U. Tel. Co.*, 108 Fed. 926.

Illinois.—Goddard v. Chicago, etc., R. Co., 202 Ill. 362, 66 N. E. 1066, affirming 104 Ill. App. 536; *American Tel., etc., Co. v. Jones*, 78 Ill. App. 372; *Union Electric Tel., etc., Co. v. Applequist*, 104 Ill. App. 517; *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 573, 39 L. R. A. 722, 62 Am. St. Rep. 390, 49 N. E. 311.

Nebraska.—Brownson v. Albion Tel. Co., 93 N. W. 201, 60 L. R. A. 426.

New Jersey.—Winter v. New York, etc., Tel. Co., 51 N. J. L. 83, 16 Atl. 188; *Nicoll v. New York, etc., Tel. Co.*, 62 N. J. L. 733, 72 Am. St. Rep. 666, 42 Atl. 532; *Holsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380.

New York.—Metropolitan Tel., etc., Co. v. Colwell Lead Co., 50 N. Y. Super. Ct. 483; *Tiffany v. U. S. Illuminating Co.*, 51 N. Y. Super. Ct. 280, 67 How. Pr. (N. Y.) 73; *Andrews v. Delhi, etc., Tel. Co.*, 36 Misc. (N. Y.) 23; *Gray v.*

New York State Tel. Co., 41 Misc. (N. Y.) 108.

North Carolina.—Hodges v. West. U. Tel. Co., 133 N. C. 225, 45 S. E. 572.

North Dakota.—Donovan v. Allert, 11 N. Dak. 289, 58 L. R. A. 775, 91 N. W. 441.

Ohio.—Dailey v. State, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *Callum v. Columbus Edison Electric Light Co.*, 66 Ohio St., 166, 64 N. E. 141, 58 L. R. A. 782; *Schaff v. Cleveland, etc., R. Co.*, 66 Ohio St. 215, 64 N. E. 145; *Denver v. U. S. Tel. Co.*, 10 Ohio Dec. 273.

Pennsylvania.—Lancaster, etc., Turnpike Road Com. v. Columbus Tel. Co., 18 Lane. L. Rev. 161.

Texas.—Erie Tel., etc., Co. v. Kennedy, 80 Tex. 71.

Virginia.—West. U. Tel. Co. v. Williams, 86 Va. 696, 19 Am. St. Rep. 908, 6 L. R. A. 775n.

Washington.—Spokane v. Colley, 16 Wash. 610.

Wisconsin.—Kruger v. Wisconsin Tel. Co., 106 Wis. 96, 81 N. W. 1041.

shall be our most earnest endeavor to harmonize to a certain degree, this very important, comprehensive, intricate and unsettled subject.

§ 108. Same continued—rights included in an easement.

Before taking up either of these subjects, it may be well to learn what are the uses to which an easement may be put in order that they may fall within the meaning of the term of public travel; or, in other words, what uses were contemplated by the parties at the time the grant was made, to which the easement might be put, and for which consideration was given? "The public easement . . . is primarily a right of passage over the surface of the highway and of so using and occupying the land within it as to facilitate such passage. In this primary right are included the grading, paving, cleaning, and lighting of the highway, the construction and maintenance of street railways⁴⁵ with the apparatus proper for their use, and the maintenance of appliances conducive to the protection and convenience of travelers while using the way. Secondarily, the easement covers uses which, though their relation to the right of passage is remote or even fanciful, are so generally advantageous to the owners of the fee, the owners of abutting property, that, rather by common consent, and custom, than by logical deduction from the primary design, they are now recognized as legitimate. Such are the construction and maintenance of sewers, water pipes and gas pipes for the convenience of persons occupying neighboring lands."⁴⁶ It has been held, however, that telephone companies do not fall within the meaning of an easement in its secondary sense.⁴⁷ "The primary intention and idea of the use of the street was for travel—moving from place to place in any way that does not interfere with the use of the street for travel in any other way. The manner or

⁴⁵ *Baker v. Selma Street, etc., R. Co.*, 135 Ala. 552, 33 So. 685, 93 Am. St. Rep. 42; *San Antonio, etc., R. Co. v. Limberger*, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730; *Doan v. Lake St., etc., R. Co.*, 165 Ill. 570, 36 L. R. A. 97, 56 Am. St. Rep. 265, 46 N. E. 520. It is otherwise if the railway is for the transportation of merchandise

as well as passengers: *Chicago, etc., R. Co. v. Milwaukee, etc., R. Co.*, 95 Wis. 561, 60 Am. St. Rep. 136, 70 N. W. 678, 37 L. R. A. 856.

⁴⁶ *State v. Loverack*, 34 N. J. L. 201.

⁴⁷ *Nicoll v. New York, etc., Tel. Co.*, 62 N. J. L. 733, 72 Am. St. Rep. 666, 42 Atl. 533.

mode of travel is not restricted to those means known or in use at the time of the dedication, but may be those modes of travel that are the result of modern inventions.”⁴⁸ A telephone company “is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method, or means of location.”⁴⁹ “Whatever the means used, the object to be attained is passage over the territory embraced within the limits of the street. Whether as a pedestrian, or on a bicycle, or in a vehicle drawn by horses or other animals, or in a vehicle propelled by electricity, or in a car drawn by horses or moved by electricity, the object to be gained is moving from place to place.”⁵⁰

§ 109. Same continued—fee in abutting owner.

The fee in an easement for public travel may be either in the abutting lotowner or landowner, which is most often the case;⁵¹ or, it may be in the public, acquired at the time the easement was obtained; or, it may be in a third party, or one from whom the abutting owner acquired, directly or indirectly, possession of his property, exclusive of the title to the easement which was granted before the abutting owner acquired possession of his property. If the fact be conceded, that the public only acquires the easement for the purpose of travel and the incidents pertaining thereto—and such as was described above—any uses other than these, would be nothing more nor less than taking the property of the abutting owner without due compen-

⁴⁸ *Donovan v. Allert*, 11 N. Dak. 289, 91 N. W. 441, 95 Am. St. Rep. 726, 58 L. R. A. 775.

⁴⁹ *Eels v. American Tel., etc., Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640.

⁵⁰ *Donovan v. Allert*, 11 N. Dak. 289, 91 N. W. 441, 95 Am. St. Rep. 725, 58 L. R. A. 775.

⁵¹ *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216; *Dovaston v. Payne*, 2 Smith's Lead. Cas. 90, where the authorities are

collected. The presumption respecting ownership of the land over which a highway runs is, that the adjacent proprietors each own to the middle of such highway; or if the same person owns on both sides, that the whole road belongs to him, subject to the public easement of the right of passage in either case: *West. U. Tel. Co. v. Williams*, 86 Va. 696, 19 Am. St. Rep. 908, 8 L. R. A. 429, 11 S. E. 106.

sation, which would be more than the state would have the power to do. The federal constitution guarantees that no private property shall be taken for public use without due compensation; and, while some of the states have embodied this same provision in their constitutional laws, most of them have enlarged on these and provided that no private property shall be taken, injured or damaged for public use without compensation. It is very clear that the private property of an individual and such as has not theretofore been granted for an easement cannot be taken against the consent of the owner or by a condemnation proceeding for public use without first compensating him for such property. This fact is too old to be discussed. It was held in early times that the owner had to be wholly deprived of the possession, use and occupation of the land, but a more just and liberal doctrine has long since been established. A man's property may be taken within the meaning of the constitutional provision, although his title and possession remains undisturbed.⁵² It follows, then, that when the abutting owner's reversionary interest in the property on which an easement has been granted has been taken for any other use than that for which it was granted, his guaranteed rights have been disregarded; for while his reversionary interest may appear insignificant and far-fetched, yet this should be as securely protected by the highest laws of our land as the little spot around which his dearest and most pleasant memories dwell, and upon which majestically and grandly stands the walls of his castle.

§ 110. Same continued—abutter's interest.

"The abutter has the exclusive right to the soil, subject only to the easement of right of passage in the public and in the incidental right of property fitting the way for the use. Subject only to the public easement, he has all the usual rights and remedies of the owner of the freehold. He may sink a drain under the road . . . he may mine under it."⁵³ He may maintain trespass against one who unlawfully cuts and carries away the grass, trees, or herbage and even against one who stands upon the sidewalk in front of his premises and uses abusive language against him, refusing to depart. He may also

⁵² Kennett's Petition, 24 N. H. 139.

⁵³ Elliott on Roads and Streets, p. 519.

maintain ejectment against a railroad company which has placed its track upon his side of the street without paying or tendering damages therefor, or against an individual who has wrongfully and unlawfully encroached thereon.”⁵⁴ He “is entitled . . . to the entire use of the land, except the right which the public has to use the land and materials thereon for the purposes of building and maintaining a highway suitable for the safe passage of the travelers.”⁵⁵ He “is entitled to free access to his house, and light and air for his house, without obstruction. If by any public purposes inconsistent with the grant to the public of the use of the street, the street is obstructed in front of his lot abutting on such street, such use entitles him to compensation.”⁵⁶ The question is, Does the construction and stringing of telephone wires along and upon a public street interfere with the free passage thereon or obstruct ingress and egress of air, light and passage to the abutting owners of property? As said before, the amount of damages or the degree or the character in which the interference or obstruction is made should have very little to do in the consideration of the question. The main question is, Is there any interference with or obstruction to the uses of the easement; or, is it used for an additional purpose other than that for which it was granted?

§ 111. Same continued—exclusive and public use.

For the reason that the public has acquired an easement over private property for the purposes of travel, is no reason why a quasi-public corporation, created for the convenience and welfare of the government, but more specially for private gain, should appropriate part of this easement for the use of such companies without compensating the owner of the fee when the consent has not already been obtained. “It is true that the use of a telegraph company is a public use. The company is a public corporation, as to which the public has rights which the law will enforce but these public rights can only be obtained by paying for them. The use, while in one sense

⁵⁴ Elliott on Roads and Streets, p. 535.

⁵⁵ Donovan v. Allert, 11 N. Dak. 289, 91 N. W. 441, 95 Am. St. Rep. 720, 58

⁵⁶ Cole v. Drew and Wife, 44 Vt. 49, 8 Am. Rep. 363. L. R. A. 775.

public, is not for the public generally. It is for the private profit of the corporation. . . . There is no reason in law or common justice why it should not pay for what it needs in the prosecution of its business." ⁵⁷ The streets and highways were dedicated to the public for the exclusive and unobstructed passage of its travelers and any use or hindrance to which it might otherwise be subjected, would be in violation of the grant. To use it for telephonic purposes would have this effect. "The erection of poles in the streets by telegraph or telephone companies is a permanent and exclusive occupation of the streets by such companies, to the continued exclusion of the remainder of the public, and to that extent is a continued obstruction of the street." ⁵⁸

§ 112. Same continued—opinion on subject.

As has been very ably said: "That the erection of a telegraph line upon a highway is an additional servitude is clear from the authorities. . . . If the right acquired by the commonwealth in the condemnation of a highway is only the right to pass along over the highway for the public, then, if the untaken parts of the land are his private property, to dig up the soil is to dig up his soil; to cut down the trees is to cut down his trees; to destroy the fences is to destroy his fences; to erect any structure, to affix any pole or post, in and upon his land, is to take possession of his land; and all these interfere with his free and unrestricted use of property. If the commonwealth took this without just compensation it would be a violation of the constitution. The commonwealth cannot constitutionally grant it to another. It is true that the use of the telegraph company is a public use; that the company is a public corporation, as to which the public has rights which the law will enforce. But the public rights can only be obtained by paying for them. The use while in one sense public is not for the public generally; it is for the private profit of the corporation. It is its business enterprise, engaged in for gain. The services can only be obtained upon their being paid for. There is no reason, either in law or common justice, why it should not

⁵⁷ West. U. Tel. Co. v. Williams, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. 631, 74 N. W. 67, 39 L. R. A. 751.
⁵⁸ Jaynes v. Omaha St. R. Co., 53 Neb. 109, 6 L. R. A. 775n.

pay for what it needs in the prosecution of its business. Upon this burden being placed upon it, it can complain of no hardship; it is the common lot of all. If the said company has use for the private property of a citizen of this commonwealth, and it is of advantage to it to have the same, it is illogical to argue that the property is of small value to the plaintiff, and in the aggregate a great matter to the plaintiff in error. This argument is not worth considering; it cuts at the very root of the rights of property. It would apply with equal force to all the transactions of life. It is sufficient to say, the aegis of the constitution is over this as over all other private property rights, and there is no power which can divest it without just compensation.”⁵⁹

§ 113. Same continued—mandatory injunction allowed.

In the following case in which a telephone company was enjoined from erecting its poles upon the streets without first obtaining the consent of the abutting owner or compensating him for such right the court said, that: “The defendants, a telephone company, without any leave or license from or consent by the complainant, but, on the other hand, against his protest and remonstrance, and in disregard of his warning and express prohibition, and without condemnation, or any other steps to that end, set up their poles upon his lands It is enough to say that it does not appear that the road board had any power to authorize any one to set up poles in the land of the highway, and thus subject the land to an additional servitude besides that for which it was condemned. What has been said is sufficient, of itself, to establish the right of complainant to relief; for in order to justify the defendants in setting up the poles, it is necessary for them to show that they have acquired the right to do so, either by consent or by condemnation from the owner of the soil. The designation by the city or town authorities of the streets where the poles may be set up is not enough.”⁶⁰

⁵⁹ West. U. Tel. Co. v. Williams, 86 Va. 696, 11 S. E. 109, 19 Am. St. Rep. 908, 6 L. R. A. 775n; Chesapeake, etc.,

Tel. Co. v. Mackenzie, 74 Md. 36, 28 Am. St. Rep. 219.

⁶⁰ Broome v. New York, etc., Tel. Co., 42 N. J. Eq. 141, 7 Atl. 851.

§ 114. When the fee is in the public.

There may be instances when the fee to the land over which the easement was laid out, is in the public and acquired at the same time the easement was granted; then, the question which presents itself for consideration is, Whether or not this affects the rights of the abutter for additional compensation; or, in other words, is the abutter entitled to additional compensation from a telephone company for the erection of its lines along the streets, whether the fee to the easement is in the public or in himself? While a majority of the courts hold that it makes very little, if any, difference as to who owns the fee,⁶¹ yet there are some which make a distinction. This distinction is shown in the following case, in which the court, said: "It appeared that the poles and wires were erected by complainant under a grant from the board of supervisors so to do, but without the consent and against the protest of the defendants. The right of way granted to the supervisors was for a public road, that is to say, a way to be used by the public for ordinary travel. Where the fee of the highway is vested in the public, there is no valid legal objection to the grant by the public of a right to erect such poles and wires, without regard to the adjacent property-holders; but where, as here, the fee of the highway remains in the adjacent owner, and its use for public purposes of public travel has been granted. I think it clear that every use of the highway not in the line of such travel is an additional burden, for which the proprietor of the fee is entitled to additional compensation and which cannot be constitutionally taken from him without his consent except by proceedings, regularly instituted and prosecuted according to law."⁶²

§ 115. The distinction—in abutting owner.

While a great number of the courts, which are composed of the ablest expounders of the laws of jurisprudence, have declared that the

⁶¹ *Stowers v. Postal Tel. Cable Co.*, 65 Miss. 559, 9 So. 356, 24 Am. St. Rep. 290, 12 L. R. A. 864n; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Beesenbury v. Mut. U. Tel. Co.*, 11 Abb. N. C. 440; *Metropolitan, etc., Tel. Co. v. Colwell Lead Co.*, 50 N. Y. Supt. Ct. 488; *Broome v. N. Y.*

etc., Tel. Co., 42 N. J. Eq., 141, 7 Atl. 851. *Contra*, *Hewett v. West, U. Tel. Co.*, 4 Mackey 424; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Julia Bldg. Assn. v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398.

⁶² *Pacific Postal Tel. Co. v. Irwin*, 49 Fed. 113.

abutter's right to additional compensation is not affected by the fact that the fee to the land on which the easement has been laid out is in the public; yet we are inclined to believe and are forced to assert that it is affected to such an extent that he will not be entitled to additional compensation for such use unless it materially interferes with the easement of access to his property or passage over the streets. Suppose we take a case where the fee to the land, on which is laid out an easement, remains in the grantor or the abutting lot-owner. Here the public only acquires the right to travel over the easement, and all other rights, titles and interest to the land are in the grantor; then if the public should lose its right in the easement, which may be done, by a relinquishment of its rights, what would become of these rights? Would they not revert to the abutting owner, and that, too, whether he acquired his interest before or after the grant of the easement? He most assuredly would. Let us suppose again, that a telephone company is constructed on this easement, without the abutting owner's consent or without appropriating additional compensation to him; and the same is there at the time the public loses its easement, can it be held for a moment that the company could continue to use the easement after the title has reverted to the original owner, without making compensation to him or obtaining his consent? If it should have this right, there might be some reason in holding that it might occupy this easement for its right of way before the public easement has been lost, without giving additional compensation to the owner of the fee; but this, as we hold—and the same opinion is indulged in by most of the late courts, as we have shown—is not the case. The same plausible reason might be entertained, that a telephone company could as well continue to occupy an easement to which the public had lost its interest—and by reason of which the public interest had reverted back to the abutting owner—as this company would have to occupy other private property of the abutting owner and that over which no easement had ever been granted.

§ 116. Same continued—in the public.

The same results would not occur should the fee be in the public.⁶³ Under these circumstances we can hardly conceive of an instance

⁶³ *Cleveland Burial Case Co. v. Erie* v. *Wisconsin Tel. Co.*, 106 Wis. 96, 81 R. Co., 24 Ohio Cir. Ct. 107; *Kruger* N. W. 1081, 50 L. R. A. 298.

when the public would lose its fee in the land on which the easement is laid out by any legal proceeding. It surely would not by non-user. Then, if this is the case, the telephone company could continue to use the easement as a right of way, even after a discontinuance on the part of the public to use the easement. While it is not very clear to our mind, yet we are inclined to believe that the public might exact of these companies a compensation for the use of its easement, but the same would have to be done by a statute to that effect. When the legislature gives to telephone companies the authority to construct their poles and lines along and upon the public highways and streets, the state then at that time gives the consent for these companies to occupy these highways after they have complied with certain requirements and conditions—among which one may be for compensation. When, in fact, the construction of these lines upon a street or highway is an additional servitude thereon, the public, if it can, is the only one who can complain. It therefore follows that if the owner's easement of access to his property or his passage over the streets is not interfered with, he cannot be heard to complain. In other words, he cannot maintain an action for an injury to the soil or bring an action of ejectment; but he nevertheless has a remedy for any special injury to his rights by the authorized acts of others.⁶⁴ Thus, merely stringing of wires before one's property is not an injury entitling him to preliminary injunction,⁶⁵ or he cannot complain if the wires are in a conduit laid under the sidewalk.⁶⁶ But should his easement to travel be obstructed or interfered with, he might demand compensation of the company, notwithstanding the fact that the fee is in the public. Thus, the easement of access embraces the use of an upper-story door for receiving merchandise.⁶⁷ If the multiplicity of wires obstructs the free passage of air or light, or if they materially obstruct the fire department in putting out fire, whereby the property-owner is damaged, he may exact of such company compensation for the uses of the streets for its posts and wires.

⁶⁴ *Chesapeake, etc., Tel. Co. v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 691.

⁶⁵ *Roake v. American Tel., etc., Co.*, 41 N. J. Eq., 35, 2 Atl. 618.

⁶⁶ *Coburn v. New Tel. Co.*, 156 Ind. 90, 59 N. E. 324, 50 L. R. A. 671.

⁶⁷ *Hays v. Columbiana County Tel. Co.*, 12 Ohio Cir. Dec. 167, 21 Ohio Cir. Ct. 480.

§ 117. When title or fee is in third party.

We now come to the third and last division of this subject, that is, should the abutting owner, be compensated by a telephone company which constructs its line of wires upon the street adjacent to his property, when the title is in some third party?⁶⁸ There may be instances where neither the abutting owner nor the public has acquired the fee to the land on which the easement is laid out, but that it still remains in the original owner of the property or his heirs. Under such circumstances, who, if any one, is entitled to compensation? This question, as far as it has come to our knowledge, has never been directly adjudicated.⁶⁹ In such instances, there may be two entitled to compensation; the original owner, and the abutter. The former for the additional burden or injury to the soil, and the latter for the interference of his access to his property. The original owner or his heirs would have the same right to exact of these companies additional compensation for the use of the public easement for the construction of their lines, as the abutter would have in case the fee was in the latter. His grounds for same, however, would be the fact that the use was an additional burden, and not on the ground that it was an interference with the access to his property. The abutter would have the same ground upon which to base his right for exacting compensation for the use of the public easement by a telephone company, as he would have in case the fee was in the public. In order to obtain compensation from these companies, under such circumstances, it must be shown that access to his property has been interfered with and not because there has been an injury inflicted upon the soil. Hence, if an appropriation of the street by one of these com-

⁶⁸ It will be settled that the owner of lots "have a peculiar interest in the adjacent street which neither the local nor general public can pretend to claim — a private right in the nature of an incorporeal hereditament legally attached to their contiguous grounds—an incidental title to certain facilities and franchises assured to them by contract and by law," and which are as inviola-

ble as the property in the lots themselves." 8 Dana 294; *Haynes v. Thomas*, 7 Ind. 38; *Rowen v. Portland*, 8 B. Monr. 232; *Le Clereq v. Gallipolis*, 7 Ohio 217; *Cincinnati v. White*, 6 Peters 431, cited in *Elizabeth, etc., R. Co. v. Combs*, 10 Bush 382, 19 Am. Rep. 67.
⁶⁹ *Chesapeake, etc., Tel. Co. v. Mackenzie*, 74 Md. 86, 28 Am. St. Rep. 219, 21 Atl. 559.

panies, even under legislative and municipal sanction, unreasonably abridges the right to use the streets as a means of ingress and egress, or otherwise, and he is thereby deprived of his right without compensation, an action will lie against such companies, guilty of usurping such unreasonable and exclusive use, for the recovery of such immediate and direct damages as he may have suffered.⁷⁰

§ 118. Effect of legislative grant—not a nuisance.

Although the posts and wires composing a telephone line are an additional burden on the street, for which compensation must be made to the owner of the abutting property, yet concurrent legislative and municipal authority, granted to a telephone company to erect its poles and suspend its wires in and over the streets of a city, will protect it from being treated as a trespasser and its works from being declared a nuisance, if they are so constructed as not to obstruct or interfere with the use of the streets by the public or the owner's right of ingress or egress to and from his abutting property.⁷¹

§ 119. Amount of compensation to abutter.

It being conceded that the construction of a telephone line upon a street constitutes a new use thereof, and thereby and thereon imposing an additional burden; and it following that the abutting lot-owner may be entitled to an additional compensation for such use; and for damages for any material injury to the easement or access and passage over the streets, the question which necessarily follows is, How much should he recover from these companies for the use of the easement, and how much should he be allowed as damages for injuries to his right in same? "The true measure of damages . . . is not what a particular individual would be willing to

⁷⁰ *Elizabeth, etc., R. Co. v. Combs*, 10 Bush 382, 19 Am. Rep. 67; *Schurmeir v. St. Paul, etc., R. Co.*, 10 Minn. 82, 88 Am. Dec. 59; *Cooley Const. Limit.*, 556.

⁷¹ *Kester v. West. U. Tel. Co.*, 108 Fed. 926; *West. U. Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. 109, 6 L. R.

A. 775n, 19 Am. St. Rep. 908; *Postal Tel. Cable Co. v. Norfolk, etc., R. Co.*, 88 Va. 920, 14 S. E. 820; *Eels v. American Tel., etc., Co.*, 65 Hun (N. Y.) 516, affirmed 143 N. Y. 133; *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193

charge for having the poles put up or remain, nor the amount some other person might consider the rental value was depreciated for the purposes of his business; but where the land of plaintiff is not taken nor his soil actually invaded, the measure of damages, as adjudged in many cases is, either: (1) The extent to which the rental or usable value of the particular property has been diminished by the trespass or injury complained of;⁷² or, (2) the difference in the value of the property before the construction of the poles and its value afterwards, if the depreciation in value has been caused by the erection and maintenance of the poles.⁷³ Where there is nothing to show that any special damage has been suffered, the principle seems to be established by many respectable authorities, that the abutter is entitled to recover such compensation as the use of the ground was worth during the time and for the purpose it was occupied.⁷⁴

§ 120. Damages to abutting owners—amount.

The fact that the abutting lotowner is compensated for the new use of the street for telephone lines will not prevent him from recovering damages for any material injury to the easement of access and passage over the street. As, for instance, if the company should erect its poles and string its wires in the premises of the abutter so as to interfere with the free access to his property or obstruct the air and light to same, he would be entitled to damages for such injury, notwithstanding the fact that he has already been compensated for the additional servitude of the street. And he may be allowed punitive damages when there is an element of wanton or malicious motive, or such reckless disregard of his rights by the company, in the commission of the injury—and all repetitions thereof—as he would be entitled to.⁷⁵ If such are not the facts in the case, he would

⁷² *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 815, 1 Am. St. Rep. 362; *Wood v. State*, 66 Md. 61, 5 Atl. 476.

⁷³ *Shepherd v. Baltimore, etc., R. Co.*, 130 U. S. 426, 9 S. Ct. Rep. 598.

⁷⁴ *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32, 1 Am. St. Rep. 362, 10 Atl. 815.

⁷⁵ *Ashby v. White*, 2 Ld. Rayne 955; *Millor v. Spaterman*, 1 Saund., note 2, p. 346a; *Taylor v. Herniker*, 12 Ad. & E. 488; *Dixon v. Clow*, 24 Wend. 188; *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 815, 1 Am. St. Rep. 362; *Woods v. State*, 66 Md. 61, 5 Atl. 476.

only be entitled to nominal damages; and, the measure of which, where punitive or exemplary damages are not claimed, is the difference in the value of the property before the construction of the lines and its value afterwards, if the depreciation in value has been caused by the erection of the poles.⁷⁶ It is not necessary that the abutting owner should give affirmative proof of his having sustained any particular amount of damages;⁷⁷ for any unauthorized entry upon another's land is a trespass, and whether the owner suffers substantial injury or not, he at least sustains a legal injury, which entitles him to some damages, though they may be very small under some circumstances.⁷⁸

§ 121. Remedies of adjoining lot-owner.

When a telephone company constructs its lines along and upon a street without first having obtained the consent of the legislative authority, the occupation thereof becomes unlawful and amounts to a public nuisance, and the abutter may enjoin the company or bring an action of damages against it; but in determining the nature of the case to be brought, the circumstances in the particular cases must first be considered. The remedy may be by an action of ejectment, an injunction, or by an action for damages. If the fee to the land on which the easement is laid out is in the abutting owner, and the company constructs a line of wires thereon without his consent or without compensating him therefor, he may have the same removed, in case they have not progressed too far in the construction of same, by an action of ejectment.⁷⁹ The state only acquires a right of pas-

⁷⁶ *Shepherd v. Baltimore, etc., R. Co.*, 130 U. S. 426, 9 S. Ct. Rep. 598; *Chesapeake, etc., R. Co. v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 227, 21 Atl. 690; *Erie Tel. Co. v. Kennedy*, 80 Tex. 71, see *Postal Tel. Cable Co. v. Bruen*, 39 N. Y. Supp. 220, where the erection of poles one hundred and fifty feet apart was held to give a right to nominal damages.

⁷⁷ *McConnel v. Kibbs*, 33 Ill. 175, 85

Am. Dec. 265; *Atwood v. Fricat*, 17 Cal. 37, 76 Am. Dec. 567.

⁷⁸ 24 Wend. 188; *Ashley v. White*, 2 Ld. Raym. 955; *Miller v. Spaterman*, 1 Saund., note 2, p. 346a; *Taylor v. Henriker*, 12 Ad. & E. 488; *Dixon v. Clow*, 24 Wend. 188; *Baltimore, etc., R. Co. v. Boyd*, 1 Am. St. Rep. 365.

⁷⁹ *Postal Cable Tel. Co. v. Eaton*, 170 Ill. 513, 40 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47

sage to the easement; and all the other rights and interest to the soil, except such easement, remain in the abutting owner. Any use to which the easement might be placed other than such as would fall under the right of passage, would be an additional servitude to the land for which additional compensation would have to be made, and it is pretty generally held that a telephone line upon the easement is an additional burden and one not contemplated at the time the grant was given; so this additional burden, as any other trespass, could be removed by an action of ejectment. "I see no ground," as was ably observed by Lord Mansfield, "why the owner of the soil may not bring ejectment as well as trespass. . . . 'Tis true, he must recover the land subject to the way; but surely he ought to have a special remedy to recover the land itself, notwithstanding its being subject to an easement upon it."⁸⁰ As the public only acquires an easement of travel over the land, the abutting owner thereof has the same remedies to remove all intruders, trespassers and obstructions therefrom as he would have should they be on his private property. When any of these injuries are on any of his private property without his consent, he might have the same removed by ejectment; so the same remedy could be exercised when they had encroached upon his other property upon which an easement had been laid out, and this, too, notwithstanding the fact that the same was granted before he acquired the title to the abutting property.⁸¹ It has been held that an action of injunction will lie,⁸² but in either instance, the abutting owner might be estopped to prosecute such actions where he had ap-

Am. Rep. 453; West. U. Tel. Co. v. Williams, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. 109, 6 L. R. A. 77n. Purchaser succeeds to right of vendor: Postal Tel. Cable Co. v. Eaton, *supra*.
⁸⁰ Goodtitle v. Alker, 1 Burr. 133, Cooper v. Smith, 9 S. & R. 26, 11 Am. Dec. 658; Alden v. Murdock, 13 Mass. 256; Bissell v. N. Y. C. R. Co., 23 N. Y. 61; Carpenter v. Oswego, etc., R. Co., 21 N. Y. 655; Jersey City v. Fitzpatrick, 30 N. J. Eq. 97; Perry v. New Orleans, etc., R. Co., 55 Ala. 413, 28 Am. Rep. 740, all cited in Terre Haute, etc.,

Co. v. Rodel, 87 Ind. 128, 46 Am. Rep. 164. See, also, Robert v. Sadler, 104 N. Y. 229, 58 Am. Rep. 498, and notes thereunder.

⁸¹ Postal Tel. Cable Co. v. Eaton, 170 Ill. 573, 62 Am. St. Rep. 390, 49 N. E. 365, 39 L. R. A. 722.

⁸² Injunction has been held to be the proper remedy in such a case. Gray v. N. Y. St. Tel. Co., 41 Misc. (N. Y.) 108. See Donovan v. Allert, 11 N. Dak. 289, 91 N. W. 441, 95 Am. St. Rep. 720, 58 L. R. A. 775; Denver v. U. S. Tel. Co., 10 Ohio Dec. 273.

parently acquiesced in the construction of the lines.⁸² The company would be allowed an opportunity to perfect its rights by instituting condemnation proceedings.

§ 122. Same continued—ignorance of rights.

The same state of facts will exist notwithstanding the fact that the company erects its poles and stretches wires along the streets with the belief that it had the legal right so to do, but without obtaining the consent of the abutting owner or seeking to acquire his rights by negotiation or condemnation proceedings.⁸⁴ *Ignorantia juris neminem excusat*, is an old maxim and is founded on the presumption that every one who is competent to act for himself is bound to know the law.⁸⁵ It is presumed that every company has investigated the law applicable to its right in constructing a line of wires upon the easement, and if it has not and afterwards learns that it has no right to make such construction, the company will be held liable just the same.

§ 123. Same continued—action for damages.

Another remedy which an abutting owner may maintain against a company for constructing, without his consent, a line of wires upon the easement, is by an action of damages. This method is generally exercised when the abutter's easement of access is interfered with. In these actions it is no defense that the company has obtained legislative authority, for it is generally in such cases that these actions are brought. Damages would be the proper action where the company has been in operation for some time; as the abutting owner would be estopped to enjoin where the company had gone to considerable expense in erecting the line, and the abutter has apparently acquiesced in the erection of same.⁸⁶ There may be exceptions to the rule where

⁸² *Dallinger v. Pittsburg, etc., Tel. Co.*, 31 Pitts. Leg. J. U. S. (Pa.) 37, 14 York Leg. Rec. (Pa.) 46; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 19 Am. St. Rep. 461, 11 L. R. A. 634n.

⁸⁴ *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 19 Am. St. Rep. 461, 11 L. R. A. 634n.

⁸⁵ *Story's Eq. Juris.*, § 116.

⁸⁶ *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1, 19 Am. St. Rep. 461, 11 L. R. A. 634n; *Brownson v. Albion Tel. Co.*, 23 N. W. 201, 60 L. R. A. 429; *Maxwell v. Central Dist. Tel. Co.*, 53 W. Va. 121, 41 S. E. 125; *Omaha v. Flood*, 57 Neb. 124, 77 N. W. 379.

the maintaining of the line would become too obnoxious to the comforts of life or the enjoyment of his rights. For instance, cases may happen where the wires become so numerous as that the bulk of them obstruct the abutting owner's free access to air and light. In such cases he could recover damages for such injury and also enjoin the company from using the easement any longer for such use. Repeating again the law—the construction of a telephone line upon an easement without legislative consent becomes a public nuisance and may be abated like any other nuisance; yet if the company has expended much capital in its construction and is nearing completion, the abutter would be estopped to enjoin further work on same, on the ground of apparent acquiescence, but this would not be any bar to his recovering compensation for the additional use to which the easement was put, and also damages for any injury to his soil—such as the digging of holes for posts, trimming trees,⁸⁷ cutting up hedges and throwing down fences, and also for any obstruction to the easement of access to his property. Should the use to which the company puts the easement be such as would materially, permanently and continuously injure the premises and his life and home comforts, the proper remedy would be by an action of injunction.⁸⁸

§ 124. Further considered—unauthorized use of street—may be enjoined.

Where there is an unauthorized use of a street either by the company not complying with the ordinance, or by utter lack of authority to use same, it may be enjoined from carrying on further business.⁸⁹ The legislature or the municipality may require the company to construct its poles and wires in a certain prescribed manner, and this it

⁸⁷ *Dailey v. State*, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724.

⁸⁸ *Hay v. Columbiana County Tel. Co.*, 12 Ohio Cir. Dec. 167, 21 Ohio Cir. Ct. 480; *Broome v. N. Y., etc., Tel. Co.*, 42 N. J. Eq. 141, 7 Atl. 851; *Russ v. Penn. Tel. Co.*, 15 Pa. Co. Ct., 226, 3 Pa. Dist. 654.

⁸⁹ *Mut. U. Tel. Co. v. Chicago*, 16 Fed. 309; *People v. Metropolitan Tel., etc., Co.*, 31 Hun (N. Y.) 596; *Utica v. Utica Tel. Co.*, 24 N. Y. App. Div. 361; *Norshfield v. Wisconsin Tel. Co.*, 102 Wis. 604, 78 N. W. 735. See, also, *Reg. v. United Kingdom Electric Tel. Co.*, 2 B. & S. 648, note 110 E. C. L. 648, note 31 L. J. M. C. 166.

must do or be subject to an injunction. As for instance, it is often required of these companies by ordinances, that the poles must be of such a size and a certain distance apart, or that the wires must be of a certain height.⁹⁰ In some states there have been statutes passed which require all telephone companies doing business in cities above a certain population to place their wires under the surface; on failure to perform any of these requirements an injunction suit may be maintained either by the city⁹¹ or by an abutting lot owner who is affected by the unauthorized use,⁹² but not at the suit of a rival company.⁹³ And the rule prevails whether the occupation of a street was never authorized or has ceased to be lawful because of the valid withdrawal of an original authority.⁹⁴

§ 125. Liabilities for cutting trees overhanging sidewalks.

A telephone company is liable for trespassing upon the premises of an abutting owner for the purpose of cutting or trimming trees overhanging the sidewalk. It very often becomes necessary in the construction of telephone lines in cities to cut and trim valuable and ornamental trees overhanging the sidewalk, in order to suspend the wires from post to post; in doing so, the owner thereof usually raises serious objections. The companies, then, are face to face with this question of right and power. They are generally given the power, along with their license, to cut and trim such overhanging trees as may be an obstruction to the erection of their wires, but when this grant is given them, it is not understood that the owners are to be deprived of their property without the company first making or tendering them due compensation for their property; or otherwise his

⁹⁰ If the company be authorized to use poles of such size and height as is reasonably necessary, and uses poles of greater size or height, the authority granted to it is no protection. *People v. Metropolitan Tel., etc., Co.*, 31 Hun (N. Y.) 596.

⁹¹ See cases in note 90 for reference.

⁹² *Irwin v. Great Southern Tel. Co.*, 37 La. Ann. 63; *Maxwell v. Central Dist., etc., Tel. Co.*, 51 W. Va. 121.

41 S. E. 125. See, also, *Donovan v. Allert*, 11 N. Dak. 289, 91 N. W. 41, 95 Am. St. Rep. 720, 58 L. R. A. 775.

⁹³ *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 65 N. E. 329, affirming 100 Ill. App. 57.

⁹⁴ *Mut. U. Tel. Co. v. Chicago*, 16 Fed. 309; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 21 Am. St. Rep. 764, 13 L. R. A. 454n.

property would be used for public purposes without compensation, which would be in violation of the constitution.⁹⁵ These companies must pay to the owners of the trees such damages as they would be entitled to. While the gravamen of an action, brought for the purpose of recovering damages for the cutting of overhanging trees on the sidewalk, is the trespass upon the premises of the abutting owner, this could, however, be avoided by providing means—as by step ladders or other means—to reach the trees or limbs from the street,⁹⁶ yet then they would nevertheless be liable if the trees were injured to any extent. For instance, if it were necessary to cut the trees in order to lay the telephone line, this would not warrant cutting them so as to leave in the foilage an open space from twenty-five to forty feet in circumference for the mere purpose of passing through it an almost imperceptible wire.⁹⁷ This, however, would not be the case if the trees had been declared a nuisance and the owners thereof had been authorized to move same. A municipality may declare them a nuisance when they obstruct travel along the streets or when the limbs prevent the sun from drying the sidewalks and thereby creating constant dampness and causing decay: but a telephone company could not abate the nuisance on its own accord.

§ 126. Same continued—punitive damages.

The company may commit the trespass in such a way as would entitle the lotowner to punitive or exemplary damages, as in the case where the trespass was wanton and malicious, the injured party would be entitled to recover both nominal and vindictive damages. This was so held where a telephone company had authority from the city to construct a line of wires upon the streets and in making such construction attempted to cut and trim limbs on ornamental trees overhanging the sidewalk. The owners of these trees objected to their being trimmed in any manner, but in order to accomplish this work the employee stole a march on the lotowner by going to the premises late at night and then entering the premises and doing the

⁹⁵ Board of Trade Tel. Co. v. Barnett, 107 Ill. 597, 47 Am. Rep. 453.

⁹⁶ Memphis Bell Tel. Co. v. Hunt, 16 Lea. 456, 57 Am. Rep. 237.

⁹⁷ Tessat v. Great Southern Tel., etc., Co., 39 La. Ann. 996, 4 Am. St. Rep. 248, 3 So. 261.

work.⁹⁸ In another case the employees of the company waited until the owner of the trees, who had objected to the cutting of his trees, had gone off on a visit before the trimming was done.⁹⁹ The court granted damages to these injured parties for malicious and willful trespass of the company. It makes no difference if the company's agent in charge of the construction was absent at the time the trespass was committed, the company will still be liable.¹⁰⁰

§ 127. Willful intent—question for jury.

Punitive damages are imposed on a corporation as a means of punishment for its wrongful acts, and in order for a corporation to be guilty of a criminal wrong, it must have had an intent to commit such wrong. Applying the rule to the present discussion, if the employees of a telegraph or telephone company in good faith honestly thought from the circumstances that they had the right to cut certain trees on the premises of another, they cannot, within the meaning of the law, to be held to be guilty of a crime, although they had no right or lawful authority to cut such trees; however, if they acted heedlessly, recklessly and carelessly, without honestly believing that they had the right to do so they or rather the company for which they are working, will be liable in punitive damages, yet it is a question of fact to be decided by a jury as to whether or not they acted in such a way as to make the company liable for such damages.¹⁰¹

§ 128. Trees on the sidewalk.

There seems to be a difference in the effect in the trimming or cutting of trees which are growing in front of the premises of the abutter on the sidewalk, or between the sidewalk and the street, and those growing on the premises of the abutter but hanging over the sidewalk. The sidewalk and streets are for the benefit of public travel, and all obstructions thereon may be declared a nuisance and removed by abatement. In most cities and towns, there may be seen trees growing upon or on the outer edge of the sidewalk—the same having been planted either by the city or the abutter or vendor, and

⁹⁸ *Memphis Bell Tel. Co. v. Hunt*, 16 Lea. 456, 57 Am. Rep. 237.

⁹⁹ *Clay v. Postal Tel. Co.*, 11 So. 158.

¹⁰⁰ *Tessat v. Great Southern, etc., Tel. Co.*, 39 La. Ann. 996, 3 So. 261, 4 Am. St. Rep. 248.

¹⁰¹ *Daillet v. State*, 57 Ohio St. 348, 46 Am. St. Rep. 578, 24 L. R. A. 724, 49 N. E. 79.

for the purpose of shade, ornament and health. The question may be asked: What interest has the abutter in these trees? His interest in the trees, whether they were planted by him on the sidewalk, or acquired by devolution of title to the adjacent property, is a qualified and limited ownership, subordinate to the public right to safe and convenient passage, and to the rights, powers and duties of the governing municipal body in the protection, promotion and establishing of every public use in and upon the streets in a city.¹⁰² A question which might necessarily follow is this: Has the city such control over the streets as would enable it to grant to a telephone company the power to cut or trim such trees without compensating the abutter? If the fee to the streets is in the city, it could grant this power, but should the fee be in the abutter, the city would have no authority, unless it were necessary and beneficial to the latter to grant such a power. The abutter only grants to the public the right of easement and reserves to himself all other interest in the soil. So, it follows, that he is entitled to all that grows upon the easement such as trees, and grasses, to the center of the way and also to all minerals and other substances beneath the soil; yet in making the grant to the public it was understood that the easement would necessarily have to be put in and maintained in a passable condition. So, also, any obstruction which would interfere with travel or the convenience thereto might be abated; and where it is necessary to remove or trim these trees for public travel or for such secondary uses to which these streets might be put, the same may be done without compensating the abutting owner. It is presumed that he was amply compensated for these at the time the grant to the street was acquired. While the telephone company would have to compensate these lot-owners for cutting and trimming these trees, yet if in connection with these companies there is another contrivance, attached to the poles of the company—as a telegraph fire-alarm wire—and the same is specially for the benefit of the city, the owner would not be entitled to compensation for the injury to his said trees, caused by the construction of this fire-alarm wire,¹⁰³ for this is a secondary use to which the streets may be put and one contemplated at the time the grant was made.

¹⁰² *Baker v. Gows Normal*, 81 Ill. 108.

¹⁰³ *Southern Bell Tel., etc., Co. v. Francis*, 19 So. 1.

CHAPTER VIII.

OVER PRIVATE PROPERTY.

- § 129. By consent.
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- 140. The interest acquired.
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§ 129. By consent.

Where a telephone company occupies the private property of an individual for the construction of a line of wires, there is no question but that the landowner should be compensated for the use of his land.¹ There are two ways by which the company may legally ac-

¹ Dailey v. State, 51 Ohio St. 348, 37 N. E. 810, 24 L. R. A. 724, 49 Am. St. Rep. 578; West. U. Tel. Co. v. Williams, 86 Va. 696, 11 S. E. 106, 19 Am. St. Rep. 908, 8 L. R. A. 429n; Stowers v. Postal Tel., etc., Co., 68 Miss. 559, 9 So. 356, 12 L. R. A. 864n, 24 Am. St. Rep. 290; Board of Trade Tel. Co. v. Barnett, 107 Ill. 507, 47 Am. St. Rep. 453; McCormick v. Dist. of Columbia, 104 Ill. 507, 54 Am. St. Rep. 290; Peace v. Drew, 136 Mass. 75, 49 Am. Rep. 14; Postal Tel. Cable Co. v. Eaton, 170 Ill. 513, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722; Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am.

St. Rep. 358. This question is decided in American Telephone, etc., Co. v. Pearce, 71 Md. 535, 18 Atl. 910, where it is determined that a telegraph or telephone company is, with respect to the right to construct its lines over private property, just as much subject to the constitutional prohibition against taking private property for public use without just compensation as is a railway or any other corporation clothed with the power of taking private property for public use; and the averment that such company is proceeding, or threatens to proceed, to construct its line of poles or wires on and over the complainant's land without his leave or

quire the right to occupy the lands of the individual: one is by an agreement entered into with the owner of the land, or one who has the right to manage and control it; and, the other is by a condemnation proceeding instituted by the company. With a few exceptions, a landowner has the absolute power of making such disposition of his land as he may see fit. He may sell, rent, lease, mortgage, or make a grant or gift of it to any one, by any kind of a contract or agreement which he may, in good faith voluntarily make. Therefore, it necessarily follows, that he may make any kind of an agreement with a telephone company which the latter may accept for the construction of a line of wires upon and across his private property. He may sell, or give it a right of way; and in either instance, the parties would be controlled by the contract or agreement made between them: and, in case the right is acquired by the means of purchase, the consideration for which, may be in money value; or, it may be for the right to use the telephone for a period of time; or, for other conveniences which the landowner may receive by reason of the line being on his premises. There are some inconveniences and liabilities attached to a company, where it enters upon the premises of an individual's property, by a mere parol license, in that the license, is revocable at will;² and a transfer of the land, is an implied revocation of it.³ Poles and wires erected, under an agreement with a landowner, are subject to the lien of a prior mortgage, which included after acquired property.⁴

§ 130. By condemnation proceedings.

If an agreement with the landowner cannot be obtained, resort must be had to the local statutes, authorizing the right to condemna-

license, and without paying or tendering him compensation for the use of his land for this purpose, is sufficient to entitle him to an injunction. Under a license from a municipal corporation for the erection of a telephone line, or a fire-alarm telegraph, there is no authority to enter private property and cut off the limbs of trees, although they project over the line of the sidewalk on the street: *Tissot v. Great*

Southern Telegraph, etc., Co., 39 La. Ann. 996, 3 So. 261, 4 Am. St. Rep. 248; *Memphis Bell Tel. Co. v. Hunt*, 16 Lea 456, 57 Am. Rep. 237.

² *Winter v. New York Tel. Co.*, 51 N. J. L. 83, 16 Atl. 188.

³ *Andrews v. Delhi, etc., Tel. Co.*, 73 N. Y. Supp. 1129.

⁴ *Mourmouth County Electric Co. v. Central R. Co.*, 54 Alt. 140.

tion.⁵ In almost all of the states, statutes exist providing for the acquisition of private property for public use on due compensation being given or tendered; and, these statutes embrace, either expressly or by implication, the purposes of telegraph or telephone companies. The power to exercise the right of eminent domain is sovereign within itself and exists without a constitutional provision to that effect; and the same may be delegated to any corporation exercising a public function.⁶ It has been held that the transmission of intelligence by electricity is a business of public character, to be exercised under the public control, in the same manner as the transportation of goods or passengers by railroad.⁷ Every citizen holds his land subject to this right; but it must be clearly understood that the easement should be acquired for public use; and should the company, attempting to exercise the right, construct the line for strictly a private use, it may be enjoined by the landowner; or, otherwise, it will be liable for an unlawful trespass. The owner must also be compensated, for the easement, in accordance with the damages sustained.

§ 131. General rule—conditions precedent.

The general rule applicable in this connection, with respect to the conditions precedent to the right to condemn, the nature of the right and the procedure to be adopted are those governing condemnations generally, subject only to the modification which the inherent character of the structure under consideration demands?⁸ And, while this subject could be more appropriately treated under the title of emi-

⁵ *Louisville N. O. & T. R. Co. v. Postal Tel. Co.*, 10 So. 74.

⁶ *Swan v. Williams*, 2 Mich. 427; *Warren v. First Div. St. Paul, etc., R. Co.*, 18 Minn. 384; *Weir v. St. Paul, etc., R. Co.*, 18 Minn. 155; *Lisse v. St. Louis, etc., R. Co.*, 2 Mo. App. 155; *Ash v. Cummings*, 50 N. H. 591; *Tinsman v. Belvidere Dec. R. Co.*, 26 N. J. L. 148, 69 Am. Dec. 565; *Mattie Bloomfield, etc., Gas Light Co. v. Richardson*, 63 Barb. 437; *Bloodgood v. Mohawk, etc., R. Co.*, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313; *Alexandria, etc., F. R.*

Co. v. Alexandria, etc., U. R. Co., 75 Va. 780.

⁷ *New Orleans M. & T. R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Turnpike Co. v. News Co.*, 43 N. J. L. 381.

⁸ *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 104 Fed. 623; *Lackie v. Mut. U. Tel. Co.*, 103 Ill. 401; *Postal Tel. Cable Co. v. Morgan's Louisiana R., etc., Co.*, 49 La. Ann. 58, 21 So. 183; *Louisville, etc., R. Co. v. Postal Tel. Cable Co.*, 68 Miss. 806, 10

nent domain, where it should be more thoroughly discussed, we shall nevertheless comment on the matter to some extent here, where it will be considered specifically with respect to the rights possessed by telegraph and telephone companies. Where these statutes have delegated to telephone companies, the authority to exercise the power of eminent domain, they require of such companies certain precedent conditions before the right can be legally exercised; and it will be our purpose to relate these conditions.

§ 132. Same continued—petition—contents.

One of the conditions precedent to be performed by a telephone company, before it can legally exercise the power of eminent domain is, that a petition be filed with the court of the county in or through which the line is to be constructed in which the location of the land is specified; setting forth the names of the petitioners, their residence and authority for exercising the power; the names of the owners of the lands over which the easement is sought, their residence and the interest which they have to the lands; a description of the location, termini and route of the land line, and the description of the land and that part which the line is to traverse; it should give the size of the poles to be used, their height, length of cross-arms and distance apart; it should ask that a notice be given and commissioners be appointed to assess the amount of damages to be awarded for such condemnation; and that the same be sworn to by the petitioners, acting in the capacity of its corporate authority. There might be mentioned other conditions to be alleged in the petition, before the power could be exercised; as for instance, that the company has been unsuccessful in an attempt to acquire the easement by an agreement with the land-owner; that the company has been legally incorporated; and, that it is the most convenient and accessible land to be had by the company for the right of way. It must be in writing, and state that the taking is necessary for public use; but it is not essential in every in-

So. 74; *Broome v. New York, etc., Tel. Co.*, 49 N. J. L. 624, 9 Atl. 754; *Duke v. Central New Jersey Tel. Co.*, 53 N. J. L. 341, 11 L. R. A. 664, 21 Atl. 460; *Coles v. Midland Tel., etc., Co.*, 67, N. J. L. 490, 57 Atl. 448; *Nicoll v. New York, etc., Tel. Co.*, 62 N. J. L. 733, 42 Atl. 583, 72 Am. St. Rep. 666; *Postal Tel. Cable Co. v. Norfolk, etc., R. Co.*, 87 Vt. 349, 12 S. E. 613.

stance to make all of such allegations, as the statute may not require such; and in fact the statutes of each state should be consulted before filing such petitions since there are different conditions required in the different states. While the petition is one of the conditions precedent to a company becoming empowered with the authority of condemning the lands for easements each of the conditions stated therein is as essential to be shown, before the right can be exercised as the petition itself.

§ 133. Same continued—name of petitioners.

It is very essential that the company be incorporated in order that it may have parties appointed who may have the authority to make a petition for such condemnation proceedings. It, therefore, follows that an unincorporated company, or one organized by individuals, for strictly private purposes, could not exercise the power of eminent domain. We presume it is hardly necessary to discuss this requirement here, for this is a condition to be performed by all bodies aggregate before they can do any corporate acts; yet it is a condition precedent, nevertheless, and one to be performed before there can be parties to such a petition. The names and residence of such petitioners should be given in such a manner as to show that they are acting for and under the authority of the telephone company seeking the right of way. In other words, it must be clearly shown that it is the telephone company which is seeking through these authorized representatives the right to exercise the power of eminent domain.

§ 134. Same continued—name of land-owners—their residence and interest in lands—several tracts or interests.

Another condition to be respected by the company before the power of eminent domain can be exercised is, that the names of the land owners, their residence and the interest which they claim to the land shall be given in the petition. The court should have some knowledge of these facts in order that it may know the party to whom notice should be given of the condemnation proceedings; and to whom damages should be awarded. In many instances the land through which the right of way is sought is held in trust for another; or is managed and under the control of a guardian, executor or administra-

tor. When such is the case, the name of the trustee, guardian, executor or administrator should be given in the petition, in his fiduciary capacity. It often occurs in the construction of a line of wire that the land over which the right of way is sought belongs to different owners who have common interest therein; or it is in several pieces and belonging to the same owner; the question which presents itself is, can this land, in such instances, be condemned in one proceeding? It has been held that the same can be done,⁹ and we are inclined to think that this is a good holding; because, much trouble and expense which would otherwise be incurred, can be avoided by bringing several suits in one. While the duties of the commissioners, in ascertaining the amount of damages to which each owner would be entitled or the amount of damages incurred on each parcel of land, would be the same; yet the result of the finding, or the amount of damages assessed might be quite different, so it would be an easy matter for them to arrive at a proper and correct result in one proceeding. Therefore, where possible, this should be done.

§ 135. Same continued—description of route.

Another essential part of the petition is, that the route of the line should be sufficiently described. As in all other proceedings, to condemn private property for public use, a clear and distinct description of the land over which the right of way is to be laid out should be described so clearly and accurately as to give any one a sufficient knowledge as to its location. The beginning, ending and intermediate points of the line must be given. The statutes generally provide the manner in which the description of the route should be given; and when they do, they must be closely complied with and contain such a description of the land as that its metes and bounds may be ascertained from the public records.¹⁰

⁹ *Duke v. Central New Jersey Tel. Co.*, 35 Am. & Eng. Corp. Cas. 1.

¹⁰ *Ames v. Union County*, 27 Am. & Eng. Corp. Cas. 60. In a certain case a map containing the description of the route was filed with the petition. The location of each pole was indicated

on the map in small circles of black ink, numbered in red ink from 1 to 27, which was the total number of poles to be erected. The distances between said poles were indicated by figures in black ink between the circles. The distance of the poles from the fence

§ 136. Same continued—description of poles.

The petition should also give the size of the poles to be used, their height, length of cross-arms, and distance apart. A map or drawing showing the general course of the line and the distance apart the poles are located, should be given to aid in the description of the route and when such is filed with the petition it becomes, a part of same; provided sufficient meaning is given to show that it is a part of the petition.¹¹ The object in giving a clear description of the route and the size and height of the poles and their distance apart and the length of the cross-arms is, to provide a means by which the amount of damages to be awarded may be assessed. The greater the space the line occupies the greater should be the damages awarded. In many instances, where these companies construct line of wires across private property, the owner thereof is actually deprived of only such lands as that occupied by the poles; and when this is the case, the damages would seem to be small; and yet, the fact must not be lost sight of, that the company still retains an easement to the land, over which the wires are strung; but, it is held principally for the purpose of entering thereon to maintain and make repairs on the lines. If the cross-arms are near the surface and heavily strung with wires, the landowner would be deprived of more of his land, and of course he would be entitled to a greater compensation.

§ 137. Same continued—notice—appointment of commissioners.

The petition should pray for notice to be given to the owner of the land, over which the easement is sought; or, to the party who has this in charge, and to those who have any interest therein, in order that they may appear in court to contest the petition, or to see that proper steps have been pursued for condemning the land; or to contest the results of the commissioners. The same notice is required to be given in a case of this kind as that required in all other

on the southerly side of the highway was indicated by figures in black ink beside each circle. The distance of the poles from the fence on the northerly side of the highway was indicated by figures in or about the center of the

highway. It was held that the description conformed to all the requirements: *Duke v. New Jersey Tel. Co.*, 35 Am. & Eng. Corp. Cas. 1.

¹¹ *Duke v. New Jersey Tel. Co.*, 35 Am. & Eng. Corp. Cas. 1.

chancery or equity court proceedings. The petition also should pray that a commission be appointed by the court, whose duties shall be to investigate the route and determine the amount of damages to be awarded; but, in order to be better posted with respect to the duties of these commissioners, it would be well for the reader to consult the statutes of his state, as their duties are regulated thereby.

§ 138. Same continued—sworn to by officers.

Most of the statutes provide that the petition should be sworn to by some one having authority to act for the corporation. In the organization of all corporations, certain corporate duties are to be performed by officers empowered to do such acts. It is generally provided in the articles of incorporation that certain officers, such as the board of directors or the president or attorney, shall have the power to bring suit for the company; and when this is the case, and it is necessary for the petition to be sworn to, only such officers or parties can swear to the petition. The form of the signature would be in the name of the corporation, by said officers or attorney.

§ 139. Same continued—failure to acquire land by agreement with land-owner.

Many of the statutes make it incumbent upon the company to first make an attempt to acquire the right of way by an agreement with the landowner, before they resort to a condemnation proceeding. The object of such a provision is to avoid litigation, and to expedite the construction of the line. The landowner and the company might, and generally do, arrive at a better understanding by these mutual agreements than they would under a condemnation proceeding; so, to require the company to first make an attempt to acquire the right of way by these agreements would often avoid endless and constant expense and needless litigation. Where statutes require these steps, it is necessary that the petition should allege the fact that an unsuccessful attempt had been made to acquire the right of way by an agreement with the landowner, or the party having the control over the land and the person who would be a necessary party in a condemnation proceeding.

§ 140. The interest acquired.

When these companies construct their line of wires upon the property of private persons, they do not acquire a fee to the land, but only an easement to the right of way: the landowner retains the right to use the land for any purpose he may see fit; provided, the same does not conflict with or defeat the rights of these companies.¹² It is the general rule that where these easements are over other rights of way—as railroad rights of way—the company acquires no interest to the land between the poles and that over which its wires are stretched, more than to go thereon for the purpose of maintaining and repairing the line;¹³ the owners of the first original easement may use this space for any purpose, they may see fit. We see no reason why the same rule may not be applied to companies whose lines are across private property. It is true that the owner of the land should not use this strip of land, in a manner that would obstruct its use, or prevent the employees of the company from entering thereon, for the purpose of the repairing and maintaining the line. He may cultivate the soil, or use it for any other purpose which would not interfere with the use of the wires; but should he cultivate or use the land for other purposes, it is done with the understanding that the company's employees may go thereon for the purpose of maintaining the lines, without being guilty of trespass. Of course these employees could not enter upon and trample over any space of land they may see fit; but the width of this space should be reasonable.¹⁴ The landowner is not un-

¹²The statute does not designate the width of the strip of land that may be condemned for telegraph purposes, but only authorizes such companies to acquire such an amount of land as may be necessary and where only one line of poles is specified in the petition, and where the evidence does not show that half a rod in width is an unreasonable amount of land, the judgment condemning that much of the land will be sustained, and will be construed to authorize the erection of but one set of poles. *Lockie v. Mutual Union Tel. Co.*, 103 Ill. 401; *Union Pac. R. Co. v.*

Colorado Postal Tel. Co., 30 Colo. 133, where it was further held that a strip of land half a rod in width was not too much, and that the landowner was not bound to fence his land from this strip.

¹³*St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *Chicago, etc., R. Co. v. Chicago*, 149 Ill. 457, 37 N. E. 78, and *Id.*, 166 U. S. 226, 17 Sup. Ct. 581; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 26 So. 370, 76 Miss. 731, 45 L. R. A. 223.

¹⁴*Duke v. New Jersey Tel. Co.*, 35 Am. & Eng. Corp. Cas. 1.

der any obligation to keep up or protect this strip; so, where he abandons it, or leaves it unused, or uncultivated, the company can look to him for no protection over it. If it deteriorates in value, or becomes worthless by his failure to keep it up, he is the loser, and the company cannot look to him for any assistance. It has been held that the landowner was not bound to fence his land from this strip, but that it may be left unused or unconnected therefrom.¹⁵

§ 141. Measure of damages.

It is generally very difficult to determine the exact amount of damages which should be awarded to the land owner for the right of way for a telegraph or a telephone company. He is actually deprived of only the land which the poles occupy, and may cultivate that lying between these; for this reason, the damages should be small. It has been held, that the landowner is entitled to compensation where the wires are merely strung across his soil; although there is no actual occupation of the land.¹⁶ It may be questioned whether or not the courts would recognize such an injury.¹⁷ It appears to us that the injury to the soil is so slight that it would be a case for the application of the rule, *de minimis lex non curat*. Of course, if the wires were strung so low or near to the land as to interfere with the use of this space, the question would be quite different. In such instances, the landowner would be entitled to the value of the use of this space, of which he is deprived; but as a general rule, the parties are not confronted with questions of this nature: as the wires are almost always strung sufficiently high above the surface of the soil as to give ample room to the owner thereof to use the intervening space. In other words, the owner of the space between the poles and that over which the wires are strung is not deprived of its use; then, the question is, What amount of damages would he be entitled to? The rule laid down by the courts for the measurement of damages to railroads for the construction of these lines upon their rights of way is, that the measure of damages suffered by the railroad is not the value of the

¹⁵ Union Pac. R. Co. v. Colo. Postal Tel. Cable Co., 30 Colo. 133; Lockie v. Mut. Union Tel. Co., 103 Ill. 401.

¹⁶ 28 Am. Law Reg. 69; Pollock on Torts, 281.

¹⁷ Roche v. American Tel., etc., Co., 41 N. J. Eq. 35, 2 Atl. 618.

land embraced within the right of way between the poles and under the wires; but the damages is the extent to which the value of the use of such space by the railroad company is diminished by the use of the same by the telegraph company for its purposes.¹⁸ This rule may be a means of ascertaining the measure of damages for the right of way of a telegraph or telephone company across private property. As for instance, the owner of the land is not to be compensated for the value of the space of land between the poles and that occupied by the said poles; but the damages to which he should be entitled is the extent to which the value of the use of the land, occupied by the poles—and the spaces between them—is diminished by the use of the same by these companies. In fact, the space between the poles is diminished approximately nothing, and for which the damages should be small; yet, on account of the maxim, *cujus est solum, ejus est usque ad coelum*, he should be entitled to something. There is no question but that he is entitled to compensation for the use of the ground upon which the poles are erected; this is to be regulated by the size, number of poles, and the value of the ground taken.

¹⁸ St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Chicago, etc., R. Co. v. Chicago, 149 Ill. 457, 37 N. E. 78, and Id., 166 U. S. 226, 17 Supt. Ct. 581.

Again the court says: "The spaces over which the wires are strung from pole to pole are not taken by the telegraph company. Such damage as the construction and operation of the telegraph line causes to the spaces between the poles the appellants are entitled to recover. The telegraph company does not acquire by the judgment of condemnation the fee to any portion of the right of way. Any construction which holds that it does acquire the fee is not sanctioned by the language of the act in relation to telegraph companies. The act does not confer the right to use the land condemned for any other pur-

pose than for telegraph purposes. The company cannot take possession of it or use it for any other purpose than to erect telegraph poles, and to suspend wires upon them, and to maintain and repair the same. The company will have the right to enter upon that portion of the right of way which is between the telegraph poles and under its wires for the purpose of repairing its lines. But the telegraph company acquires no right to exclude the railroad company from the use of the land. The ownership of the railroad company remains as it was before, while the telegraph company merely acquires an easement upon what it condemns for the purpose of entering thereon in order to erect and repair the line. St. Louis & C. R. Co. v. Postal Tel. Co. (1898), 173 Ill. 508, 51 N. E. 382.

CHAPTER IX.

ON RAILROAD RIGHT OF WAY.

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§ 142. Right acquired by act of Congress.

By act ¹ of Congress, "Any telegraph company now organized, or which may hereafter be organized under the laws of any state of the Union, shall have the right to construct, maintain and operate lines of telegraph . . . over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by act of Congress, . . . provided said lines shall not be so constructed as to interfere with the travel," on such roads; and provided also, "that, before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file its written acceptance with the postmaster-general of the restrictions and obligations required by this act." Congress in 1872 declared all the roads in the country, which are now or may hereafter be in operation, post-roads. Statutes have been enacted in most of the states, which grant to telegraph and telephone companies similar rights; but these statutes are subordinate to said acts:² however, they may be resorted to for condemnation proceedings since the same is not provided for in the former acts.³ Therefore, it is seen that a part of an easement, which has already been granted for a public enterprise, may afterwards be condemned for another easement which is to be used for another public purpose. This act of Congress does not give these companies the right to construct a line of wires upon the right of way of a railroad company without first obtaining the consent of the railroad, or making a contract with the original landowner,⁴ or condemning the right of way.

§ 143. Additional servitude.

When these companies have acquired the right to construct a line of wires along and upon the right of way of a railroad company, the natural inquiry is, Whether or not it is an additional servitude to the property; if so, who are entitled to compensation, and how much? The general rule is, that the construction of a telegraph or telephone

¹ July 24, 1866.

² Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R. Co., 49 La. Ann. 58, 21 So. 183.

³ See above note for reference.

⁴ West. U. Tel. Co. v. Ann Arbor R. Co., 90 Fed. 379; Postal Tel. Cable Co. v. Southern R. Co., 89 Fed. 190; Postal Tel. Cable Co. v. Norfolk, etc., R. Co., 88 Va. 920, 14 S. E. 803.

line, along and upon the right of way of a railroad—unless the same is constructed by the latter in good faith, and for its own benefit—is an additional burden to the easement, for which the owner of the fee, and also, the first and original owner of the easement, shall be compensated.⁵ In many cases, the fee in the right of way remains in the original landowner, while there is merely an easement granted to the railroad which will revert to the former on the relinquishment of the easement. Therefore, when this is the case, the owner of the land over which the line is to be built should always be compensated for the additional burden; and yet it is not meant by this that the railroad is prevented from also recovering from these companies compensation for the use of the roadbed. The right of ways granted to railroad companies are similar to the license granted by an abutting street owner to the use of the land on which the street is constructed; and as has been seen, the owner should receive additional compensation for all additional burdens placed on the street. In some instances, the railroad company acquires the fee to the easement: and, when such is the case, the land acquired in such grant becomes its private property just the same as land acquired by any individual; and it has the same interest in and can dispose of it just the same as any individual. It would be unconstitutional to permit a telegraph or telephone company to condemn the right of way of a railroad company, when the fee was in the latter: or to use its premises for a line of wires without first compensating the railroad company, since it would be taking private property without due compensation.⁶

§ 144. Subsequent purchaser may recover.

It is not necessary that the fee in the land over which the right of way is laid out should be in the original landowner at the time the additional compensation is demanded, but a subsequent purchaser may maintain an action for damages;⁷ however, neither the original

⁵ *West. U. Tel. Co. v. American U. Tel. Co.*, 9 Biss. (U. S.) 72; *American Tel., etc., Co. v. Pearce*, 71 Md. 535, 28 Am. St. Rep. 227, 7 L. R. A. 200n; *Phillips v. Postal Tel. Cable Co.*, 130 N. Car. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; *New Orleans, etc., R. Co. v.*

Southern, etc., Tel. Co., 53 Ala. 211; *Pensacola Tel. Co. v. West. U. Tel.*, 96 U. S. 1.

⁶ *Southern Ry. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585.

⁷ *Phillips v. Postal Tel. Cable Co.*, 130

nor subsequent owners have any right to an accounting for the rents and profits received from the telegraph company, under its contract with the railroad.⁸

§ 145. When for benefit to railroad.

There is an apparent exception to the general rule that the original landowner, when the fee is in him, shall be additionally compensated for the construction of a telegraph line along the right of way of a railroad. Thus, he would not be entitled to further compensation if the line is constructed by the railroad, in good faith, for its own use, and when it is reasonably necessary for its own use.⁹ A telegraph line if not indispensable to a railroad company tends so much to facilitate its business that it has a right to build such a line and to use its right of way therefor; and it may remove all obstructions thereon for the purpose of constructing the same. Although it may have but an easement in the land and that easement limited to its use for railroad purposes, yet a telegraph is so convenient, if not indispensable to the business, that it may cut down every tree and bush on the right of way, if necessary for the most efficient use of a line built by it over and upon such right of way, just as it may dig away a hill or fill up a ravine for the sake of a water tank or a station house.¹⁰

§ 146. Same continued—no additional burden.

When telegraph line is constructed by a railroad company upon its roadbed for its own use, there is no additional servitude placed thereon for which the landowner may recover additional damages, since it is merely a legitimate development of the easement originally acquired.¹¹ If the line, however, is not constructed for such a pur-

N. Car. 513, 89 Am. St. Rep. 868, 41 S. E. 1022.

⁸ Chicago, etc., R. Co v. Snyder, 95 N. W. 183.

⁹ West. U. Tel. Co. v. Rich, 19 Kan. 517, 27 Am. Rep. 159; American Tel. Co. v. Pearce, 71 Md. 535, 18 Atl. 910. 28 Am. St. Rep. 227, 7 L. R. A. 200n; Adams v. Louisville, etc., R. Co., 13 So. 932.

¹⁰ West. U. Tel. Co. v. Rich, 19 Kan. 517, 27 Am. Rep. 159; Southern R. Co. v. Southern, etc., Tel. Co., 46 Ga. 43. 12 Am. Rep. 585; St. Jas. & D. C. R. Co. v. Dryden, 11 Kan. 186.

¹¹ Taggart v. Newport St. R. Co., 16 R. I. 668; Hodges v. West. U. Tel. Co., 133 N. Car. 225, 45 S. E. 572.

pose, it will be a new servitude, putting an additional burden on the land for which the original owner, of the land would be entitled to compensation.¹² Such use is presumed to have been contemplated in the original condemnation; and the damages resulting therefrom are part of the damages included in the assessment therefor. In other words, the railroad company may use its right of way, not merely for its track, but for any other building or erection which reasonably tends to facilitate its business of transporting freight and passengers; and, by such use, it in no manner transcends the purposes and extent of the easement, or exposes itself to any claim for additional damages to the original landowner.¹³

§ 147. Same continued—must be in good faith.

In order to avoid compensating the landowner again for the use of telegraph lines upon the right of way of the railroad, the same must have been constructed by the railroad, in good faith, for its own use. If it is constructed by any company other than the railroad, but the latter is to use it for the business of operating trains and is to pay the telegraph company rental for such use; or, if it is to give the telegraph company the compensation which the former would be entitled to receive for the use of the right of way by the latter; or, if it enters into any kind of an agreement with the telegraph company whereby the railroad company is merely to use the wires of the former in the manipulation of the trains and other business necessary for the carrying out of the public and corporate duties, and not to be an owner in any manner of the lines,¹⁴ the owner of the fee would be entitled to additional compensation for the use of his land.¹⁵ Should, however,

¹² West. U. Tel. Co. v. Rich, 19 Kans. 517, 27 Am. Rep. 159; American Tel., etc., Co. v. Pearce, 71 Md. 535, 18 Atl. 910, 28 Am. St. Rep. 227, 7 L. R. A. 200n.

¹³ West. U. Tel. Co. v. Rich, 19 Kan. 517, 27 Am. Rep. 159.

¹⁴ See, West. U. Tel. Co. v. West., etc., R. Co., 91 U. S. 283. The telegraph company contracted with a railroad corporation to put up a special wire for

the exclusive use of the railroad, and to connect it with all the offices along the route. It was held that this contract did not amount to a sale of the wire to the railroad company, and a lessee of the road would have no right to the wire other than to use it in its telegraphic service.

¹⁵ American Tel., etc., Co. v. Pearce, 71 Md. 535, 18 Atl. 910, 28 Am. St. Rep. 227, 7 L. R. A. 200n.

the line be built jointly by the railroad and telegraph companies; or, should it be constructed by these two companies as partners—and, in either instance, it is understood that the railroad company is to use the wires for its corporate purposes—the landowner would not be entitled to additional compensation from either of these companies.¹⁶ If the railroad company could build by itself without liability, it would not assume any liability by building with another. Whatever it could do and would have done for its own use and benefit, and was so done, would be so far as the landowner is concerned, *damnum absque injuria*, no matter who bore the expense; or, perhaps more correctly speaking, it would be damages already paid for.¹⁷ The telegraph line may have been originally constructed by the railroad company for its own use but upon a transfer, of such a line by the railroad company to a telegraph company, the owner of the fee may claim compensation.¹⁸

§ 148. Same continued—not taxable.

Telegraph and telephone companies are generally taxed similarly to railroad companies; that is, they are assessed with so much taxes for every mile of their line. Statutes which provide that these companies shall be thus taxed, unless clearly expressed to that effect, will not apply to companies built by railroads for the purpose of managing its trains and not for profit.¹⁹ In such cases, these lines are used by the railroad companies as an indispensable part of their machinery for the safe and expeditious moving of their trains.

§ 149. Railroad companies to be compensated.

It is not our purpose to leave on the mind of the reader the impression that railroad companies are not to be compensated for the easement granted to telegraph companies over the former's rights of way for the construction of lines of such companies, when the fee is in the original landowner, for such is not the fact. These lines are regarded as subjecting the easement of a railroad to an additional servitude,

¹⁶ West. U. Tel. Co. v. Rich, 19 Kan. 517, 27 Am. Rep. 159.

¹⁷ West. U. Tel. Co. v. Rich, 19 Kan. 517, 27 Am. St. Rep. 159.

¹⁸ Hodges v. West. U. Tel. Co., 133 N. Car. 225, 45 S. E. 572.

¹⁹ Adams v. Louisville, etc., R. Co., 13 So. 932.

and the company is entitled to compensation therefor.²⁰ The easement granted to railroad companies is for the purpose of constructing railway facilities thereon; but they have sufficient title in the easement to demand compensation for any additional rights of way to be constructed thereon, as that of an easement granted to a telegraph company: to permit one of these companies to construct a line on such easement, without first compensating the railroad company, would be unconstitutional, as it would be taking property without due compensation.²¹ The same rule applies in these cases, as that of acquiring a right of way across private property, or upon the public highway—that is, the telegraph company should first try to acquire an easement, along and upon the right of way of the railroad, by an agreement with the latter;²² but if this cannot be accomplished by contract, the telegraph company may proceed to a condemnation proceeding.²³

§ 150. Right to—must first be acquired.

The right which a telegraph company may have to construct a line of wires on the right of way of a railroad company must first be given by either some federal or state statute, or by both. For instance, where a statute provides that telegraph companies may construct their lines “along and parallel to any of the railroads of the states,” it does not authorize the condemnation of a right of way by a telegraph company along and upon a right of way of a railroad com-

²⁰ *Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 158; *West. U. Tel. Co. v. Atlantic, etc., Tel. Co.*, 7 Biss. (U. S.) 367; *West. U. Tel. Co. v. American U. Tel. Co.*, 9 Biss. (U. S.) 72; *Kester v. West. U. Tel. Co.*, 108 Fed. 926; *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *American Tel., etc., Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 28 Am. St. Rep. 227, 7 L. R. A. 200n; *Northwestern Tel. Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334, 79 N. W. 315; *Louisville, etc., R. Co. v. Postal*

Tel. Cable Co., 68 Miss. 806, 10 So. 74. See, also, *Baltimore, etc., Tel. Co. v. Morgan's Louisiana, etc., R. Co.*, 37 La. Ann. 883; *Southeastern R. Co. v. European, etc., Electric Printing Tel. Co.*, 9 Exch. 363.

²¹ *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585.

²² *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

²³ *Louisville, etc., R. Co. v. Postal Tel. Cable Co.*, 68 Miss. 806, 10 So. 74.

pany.²⁴ In Mississippi, whenever a telegraph company secures this right it becomes the duty of the railroad to receive and transport such material, construction cars, etc., as is necessary in constructing the line, and to distribute the material along the road as the telegraph company may direct "upon such terms and conditions as may be reasonable and just."²⁵ When the right is acquired under a federal grant, the company must file its written acceptance with the postmaster-general "of the restrictions and obligations required" by the statute.²⁶

§ 151. Interest acquired by telegraph companies.

Telegraph companies which are constructed along and upon the right of way of a railroad company acquire no title or interest in the easement.²⁷ The fee still remains in the original landowner or the railroad company, whichever it may be; and the telegraph companies have only the right to erect their poles upon the easement, and the right of ingress and egress thereon for the purpose of keeping up the lines. It is incumbent upon the telegraph company to construct its poles and wires so as not to interfere with the moving trains, and

²⁴ Postal Tel. Cable Co. v. Norfolk, etc., R. Co., 88 Va. 920, 14 S. E. 803; New York City, etc., R. Co. v. Central U. Tel. Co., 21 Hun (N. Y.) 261.

²⁵ Laws Miss. (1890), ch. 63, p. 72.

²⁶ Chicago, etc., Co. v. Pacific Mut. Tel. Co., 16 Am. & Eng. Corp. Cas. 271. In this case it was held: A telegraph company in the exercise of eminent domain, instituted a proceeding to condemn and appropriate so much of a bridge as was necessary to support a line of magnetic telegraph proposed to be built, and for the construction, maintenance and operation of the same. The bridge was built in pursuance of state and national legislation, and spans the Missouri river at Atchison, Kansas, where the river is navigable, and where it divides the states of Kansas and Mis-

souri. The company owning the bridge, claiming that the condemnation proceeding was without authority of law, brought an action to enjoin the same, and to prevent any interference with the bridge. Held, that, before the telegraph company can construct its line at the point named, it must file with the postmaster-general a written acceptance of the restrictions and obligations imposed by congress in an "Act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes."

²⁷ Postal Tel. Cable Co. v. Louisiana Western R. Co., 49 La. Ann. 1270, 22 So. 219; Mobile, etc., R. Co. v. Postal Tel. Co., 24 So. 408.

not to permit its lines to become dangerous to transportation along the road. The first duty which a railroad company owes to the public is to keep its roadbed in proper condition for the safety of the passengers and goods during transportation; and, in order to do this, the railroad company may make such disposition of its roadbed as may be necessary for the maintenance of same: should it become necessary to remove the poles for this purpose, it may do so without becoming liable to the telegraph company, unless the same is done negligently, carelessly or unnecessarily. In many instances, the railroad may and does widen its roadbed for the purpose of laying a side track or a double track; when it does it may remove the poles of these companies or give them reasonable time or proper notice to do the same themselves at their own expense. We mention these facts to show that a railroad company does not lose any interest or control over the easement but may make any disposition or use of it necessary for the carrying on of its business.²⁸

§ 152. By condemnation.

When a telegraph company has failed to acquire by an agreement with the railroad company an easement over the latter's right of way, the next and last step left to such company is under a condemnation proceeding. It has long been settled that property already devoted to public use may afterwards be condemned for another and different public use under authority from the state;²⁹ and as lands, whereon

²⁸ *Postal Tel. Cable Co. v. Louisiana Western R. Co.*, 49 La. Ann. 1270, 22 So. 219; *Mobile, etc., R. Co. v. Postal Tel. Co.*, 24 So. 408.

²⁹ *Kansas, etc., R. C. v. Northwestern, etc., R. Co.*, 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 36; *Batte, etc., R. Co. v. Montana, etc., R. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298; *Chicago, etc., R. Co. v. Stockweather*, 97 Iowa 159, 59 Am. St. Rep. 404, 66 N. W. 87; *Little Nestucco Road Co. v. Tillamook Co.*, 31 Or. 1, 65 Am. St.

Rep. 802, 48 Pac. 465; *St. Louis, etc., R. Co. v. Hannibal U. Depot Co.*, 125 Mo. 82, 25 S. W. 483; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S. W. 943; *Kansas City, etc., Bell R. Co. v. Kansas City, etc., R. Co.*, 118 Mo. 599, 24 S. W. 478; *Twelfth Market Street Co. v. Philadelphia, etc., R. Co.*, 142 Pa. St. 589, 21 Atl. 902; *The Sunderland Bridge*, 122 Mass. 459; *Enfield Toll Bridge Co. v. Hartford, etc., R. Co.*, 17 Conn. 40, 42 Am. Dec. 716.

In *Central Bridge Corp. v. City of Lowell*, 4 Gray 474, Bigelow, J., uses

telegraph lines are to be constructed are granted to companies for public enterprises, it necessarily follows, therefore, that these companies may condemn a part of the right of way which has already been granted to a railroad company.³⁰ While this is the general rule, yet it is a matter to be closely considered; and in no case should this right be exercised without an express³¹ legislative authority or one

the following language concerning the subject in question: "Nor is the principle thus recognized any violation of justice or sound policy, nor does it in any degree tend to impair the obligation or infringe upon the sanctity of contracts. It rests on the basis that public convenience and necessity are of paramount importance and obligation, to which, when duly ascertained and declared by the sovereign authority, all minor considerations and private rights and interests must be held, in a measure and to a certain extent, subordinate. By the grant of a franchise to individuals for one public purpose, the legislatures do not forever debar themselves from giving to others new and paramount rights and privileges when required by public exigencies, although it may be necessary, in the exercise of such rights and privileges, to take and appropriate a franchise previously granted. If such were the rule, great public improvements, rendered necessary by the increasing wants of society in the development of civilization and the progress of the arts might be prevented by legislative grants which were wise and expedient in their time, but which the public necessities have outgrown and rendered obsolete. The only true rule of policy, as well as of law, is, that a grant for one public purpose must yield to another more urgent and important, and this can be effected

without any infringement on the constitutional rights of the subject. If in such cases suitable and adequate provision is made by the legislature for the compensation of those whose property or franchise is injured or taken away, there is no violation of public faith or private rights. The obligation of the contract created by the original charter is thereby recognized."

³⁰ *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Baltimore, etc., R. Co. v. Board of Commerce*, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856; *Gold v. Pittsburg, etc., R. Co.*, 153 Ind. 232, 53 N. E. 285; *Steele v. Epsom*, 142 Ind. 397, 41 N. E. 822; *Southern Pac. R. Co. v. Southern Cal. R. Co.*, 11 Cal. 222, 43 Pac. 602; *Southwestern Tel., etc., Co. v. Gulf, etc., R. Co.*, 52 S. W. 106; *St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 521, 51 N. E. 382.

³¹ *Little Nestucco R. Co. v. Tillamook County*, 31 Oregon 1, 48 Pac. 465, 65 Am. St. Rep. 802.

On this subject Chief Justice Shaw said: "It must appear that the government intends to exercise this high sovereign right by clear and expressed terms or by necessary implication, leaving no doubt or uncertainty respecting such intent. It must also appear by the act that they recognize the right of private property, and mean to respect it; and under our constitution, the act conferring the power must be accompan-

necessarily implied.³² In most of the states, if not in all, there are special statutes applicable to such condemnations; and where this is not the case, the right is exercised under the eminent domain statutes. In order for the reader to familiarize himself with this subject, and to have a better knowledge of the procedure within his immediate jurisdiction, it is necessary to consult the statutes of his own state and the cases arising thereunder.³³

ied by just and constitutional provisions for full compensation to be made to the owner. If the government authorizes the taking of property for any use other than a public one, or fails to make provision for a compensation, the act is simply void; no right of taking as against the owner is conferred; and he has the same rights and remedies against a party acting under such authority as if it had not existed. In general, therefore, when any act seems to confer an authority on another to take property, and the grant is not clear and explicit, and no compensation is provided by it for the owner of party whose rights are injuriously affected, the law will conclude that it was not the intent of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those thus affected." *Boston, etc., R. R. v. Salem, etc., R. R.*, 2 Gray, 1, 36. See, also, *Fort Wayne v. Lake Shore, etc., R. Co.*, 132 Ind. 558, 32 N. E. 215, 13 L. R. A. 367n, 32 Am. St. Rep. 277; *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 613; *Davis v. Meyer*, 14 N. Y. (4 Kernan) 506, 67 Am. Dec. 186.

³² *Louisville, etc., R. Co. v. Whetley County*, 95 Ky. 215, 24 S. W. 604, 44 Am. St. Rep. 220; *Cleveland, etc., R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84.

³³ *United States*.—*Oregon Short Line R. Co. v. Postal Tel. Cable Co.*, 49 C. C. A. 663, 111 Fed. 842, affirming 104 Fed. 623; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 114 Fed. 787.

Alabama.—*Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 So. 408. See, also, *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211.

Arkansas.—*St. Louis, etc., R. Co. v. Southwestern Tel., etc., Co.*, 121 Fed. 278.

Colorado.—*Union Pac. R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133, 69 Pac. 564.

Georgia.—*Savannah, etc., R. Co. v. Postal Tel. Cable Co.*, 112 Ga. 941, 38 S. E. 353, 115 Ga. 554, 12 S. E. 1; *West. U. Tel. Co. v. American U. Tel. Co.*, 65 Ga. 160, 38 Am. Rep. 781.

Illinois.—*St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382.

Indiana.—*Postal Tel. Cable Co., v. Chicago, etc., R. Co.*, 30 Ind. App. 652.

Louisiana.—*Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R. Co.*, 49 La. Ann. 58, 21 So. 183; *Postal Tel. Cable Co. v. Louisiana Western R. Co.*, 49 La. Ann. 1270, 22 So. 219; *Southwestern Tel. Co. v. Kansas City, etc., R. Co.*, 109 La. 892.

New Mexico.—*Union Trust Co. v. Atchison, etc., R. Co.*, 8 N. Mex. 327, 43 Pac. 701.

Mississippi.—*Mobile, etc., R. Co. v.*

§ 153. Exception to rule.

There are some exceptions to the general rule that land can be condemned for a public use which is already being used for a public use; for instance, property cannot be taken from one corporation by another to be used for the same purpose and in the same manner for which it was used by the corporation which first appropriated it to such use and purpose.³⁴ In other words, every corporation holds property subject to the rights of the state to take it for another public use, whenever, in the discretion of the legislature the exercise requires the use for such other purpose: This is true even as to the franchise itself of any corporation;³⁵ but, in order for one corporation to take the lands or franchises of another which is in actual use by the latter, the same must have been authorized by the legislature.³⁶ A telegraph company would not deprive the railroad of the use of its right of way or any part thereof: So that part which is not essential to the employment of its franchise and property, or which is not in

Postal Tel. Cable Co., 76 Miss. 731, 26 So. 370, 45 L. R. A. 223.

North Carolina.—*Postal Tel. Cable Co. v. Southern R. Co.*, 90 Fed. 31.

Ohio.—*Postal Tel. Cable Co. v. Cleveland, etc., R. Co.*, 94 Fed. 234.

South Carolina.—*South Carolina, etc., R. Co. v. American Tel., etc., Co.*, 65 S. Car. 459, 43 S. E. 970.

Tennessee.—*Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 101 Tenn., 62, 46 S. W. 571, 41 L. R. A. 403.

Texas.—*Ft. Worth, etc., R. Co. v. Southwestern Tel., etc., Co.*, 96 Texas, 160, 71 S. W. 270, 60 L. R. A. 145; *Houston, etc., R. Co. v. Postal Tel. Cable Co.*, 18 Tex. Civ. App. 502; *Gulf, etc., R. Co. v. Southwestern Tel. etc., Co.*, 18 Tex. Civ. App. 500.

Utah.—*Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 476, 65 Pac. 735, 90 Am. St. Rep. 705.

Virginia.—*Postal Tel. Cable Co. v. Farmville, etc., R. Co.*, 96 Va. 661, 32 S. E. 468.

³⁴ *Kansas, etc., R. Co. v. Northwestern, etc., Co.*, 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; *Lewis on Eminent Domain*, § 276.

³⁵ *Kansas, etc., R. Co. v. Northwestern, etc., Co.*, 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936; *Twelfth Market St. Co. v. Philadelphia, etc., R. Co.*, 142 Pa. St. 589, 21 Atl. 909; *The Sundeland Bridge*, 122 Mass. 459; *In re Opinion of the Justices*, 66 N. H. 629, 33 Atl. 1076; *New York Central, etc., R. Co. v. Metropolitan Gas Light Co.*, 63 N. Y. 326; *In re Bellona Co.*, 3 Bland 442; *Enfield Toll Brig. Co. v. Hartford, etc., R. Co.*, 17 Conn. 40, 42 Am. Dec. 716; *Boston, etc., Co. v. Salem, etc., R. Co.*, 2 Gray 1.

³⁶ *Brette, etc., R. Co. v. Montana, etc., R. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 31 L. R. A. 298. See, also, notes 31 and 32, for further reference.

actual use,³⁷ may be condemned for telegraph lines; provided, they are so constructed as not to interfere with the free exercise of the former's franchise or with the actual operation of the road.³⁸ A somewhat different rule has been held in a few cases, where it was emphasized that the possible future needs of the railroad company must be given full consideration in determining whether any portion of its right of way may be taken from it for a telegraph line.³⁹ A railroad company acquires the right to use the right of way for such purposes, and only such, as may be necessary to carry on the business for which it was incorporated. It cannot carry on any other enterprise or business of whatever nature upon its right of way, except that which is necessary to accomplish the business of railroading; but when it does become necessary to use all or a greater part of its easement, and this cannot be done while the telegraph companies remain on the right of way,

³⁷ *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 24 So. 408.

³⁸ These foregoing rules were well stated by Folger, J., in *Matter of City of Buffalo*, 68 N. Y. 167, 175, as follows: "In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public works, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid, if the latter use, when exercised, must supersede the former, it is not to be implied from a general power given, without having in view a then existing and a particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise to one which might

thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift or power in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject-matter of it, so that by reasonable intendment some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner." *Postal Tel. Co. v. Oregon, etc., R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Southern Pac. R. Co. v. Southern Cal. R. Co.*, 111 Cal. 231, 43 Pac. 602.

³⁹ *West. U. Tel. Co. v. Pennsylvania R. Co.*, 59 C. C. A. 113, 123 Fed. 33, 120 Fed. 362. See, also, *St. Louis, etc., R. Co. v. Southwestern Tel., etc.*, 58 C. C. A. 198, 121 Fed. 278.

the latter must give way to the railroad company, to the extent of moving its lines off of the right of way. This fact seems to have been lost sight of in the case cited.

§ 154. Same continued—cannot be defeated by claiming it should be on other lands.

Such a condemnation cannot be defeated by showing that a right of way for the telegraph line may be secured over a public highway near or adjacent to the railroad, or over other property.⁴⁰ A railroad company can have no greater claim to its right of way than the public can have to the public highways, or an individual to his private property. So, to allow such condemnation to be defeated by a railroad company on this ground would give to the railroad a greater right than is given to individuals; which would virtually take away from telegraph companies the power of exercising the right of eminent domain. If this right should be defeated by either of these parties on such showing it should be by the two latter; since there is no question but that there would be less danger to the public if these lines were along the right of way of the railroads: and surely, during this day and time, it would be much more convenient and less expensive to these companies; and, at the same time, the railroad companies would not be incommoded in the least in their business affairs. Furthermore, the expenses of the railroad company might be greatly reduced on account of the competition of the many lines which would likely be on the right of way.

§ 155. Foreign telegraph companies—right to condemn.

A corporation can have no legal existence outside of the state creating it; therefore, it can transact business within the scope of its powers in other sovereignties only upon such terms and conditions as such sovereignties may provide:⁴¹ and while, under the general rules

⁴⁰ *Union Pac. R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133; *Savannah, etc., R. Co. v. Postal Tel. Cable Co.*, 115 Ga. 554, 42 S. E. 1; *Ft. Worth, etc., R. Co. v. Southwestern Tel., etc., Co.*, 71 S. W. 270, 60 L. R.

A. 145. See, also, *St. Louis, etc., R. Co. v. Southwestern Tel., etc., Co.* (58 C. C. A. 198,) 121 Fed. 278.

⁴¹ *Granger's, etc., Insurance Co. v. Kamper*, 73 Ala. 325.

of comity a corporation organized in one state may be permitted to transact business in other states,⁴² yet the power of eminent domain, granted to a corporation of one state, is not such a privilege as will be extended by comity alone to the corporation in its transactions in another state.⁴³ Therefore, this being the rule applicable to corporations in general it follows that a foreign telegraph company has no power under the charter; nor is it permitted by the rule of comity alone to exercise the right of eminent domain beyond the state of its creation.⁴⁴ A state may confer upon a foreign telegraph company the right of eminent domain⁴⁵ by an express grant;⁴⁶ and sometimes the right passes under a statutory grant of power to corporations generally;⁴⁷ thus, where a statute provides that a foreign telegraph company may exercise the right of eminent domain as a quasi-successor of another company to which it was originally granted.⁴⁸ So also, such a grant may sometimes be implied. Thus, it was held that the right which had been granted to a domestic corporation would not

⁴² *Empire Mills v. Alston Grocery Co.*, 33 Am. & Eng. Corp. Cas. 15; *Canadian Pac. R. Co. v. West. U. Tel. Co.*, 17 Supreme Court of Canada 151; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519; *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236, 10 Pac. 596; *Dodge v. Council Bluffs*, 57 Iowa 560, 10 N. W. 900; *Richwald v. Commercial Hotel Co.*, 106 Ill. 439; *Miller v. Ewer*, 27 Me. 509; *Christian Union v. Yount*, 101 U. S. 352; *Newberg Petroleum Co. v. Weare*, 27 Ohio St. 343; *William v. Creswell*, 51 Miss. 817; *Baltimore, etc., R. Co. v. Glenn*, 28 Md. 287; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; *Ohio Life Ins., etc., Co. v. Merchants Ins., etc., Co.*, 11 Humph. (Tenn.) 1; *Thompson v. Waters*, 25 Mich. 214; *Merriek v. Van Sautvoord*, 34 N. Y. 208. The same may be implied unless there is an affirmative refusal. *Colwell v. Colorado Springs Co.*, 100 U. S. 55, 3 Colo. 82; *Christian Union v. Yount*, 101 U. S. 352; *Richwald v. Commercial Hotel Co.*, 106 Ill. 439.

See note to *Cone, etc., Co. v. Poole* (S. C.), 24 L. R. A. 289.

⁴³ *Middle Brig. Co. v. Marks*, 26 Me. 326; *State v. Boston, etc., R. Co.*, 25 Vt. 433. Compare *Baltimore, etc., R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 812.

⁴⁴ *Postal Tel. Cable v. Cleveland, etc., R. Co.*, 94 Fed. 234; *St. Louis, etc., R. Co. v. Southwestern Tel., etc., Co.*, (58 C. C. A. 198) 121 Fed. 278.

⁴⁵ *Lewis on Eminent Domain* (1888), § 242; *State v. Sherman*, 22 Ohio St. 434; *Morris Canal, etc., Co. v. Townsend*, 24 Barb. (N. Y.) 658; *New York, etc., R. Co. v. Young*, 33 Pa. St. 175; *Dodge v. Council Bluffs*, 57 Iowa 560, 10 N. W. 886; *Abbott v. N. Y., etc., R. Co.*, 145 Mass. 450, 15 N. E. 91; *Gray v. St. Louis, etc., R. Co.*, 81 Mo. 126.

⁴⁶ *Gray v. St. Louis, etc., R. Co.*, 81 Mo. 126.

⁴⁷ *Re Marks*, 6 N. Y. Sup. 105.

⁴⁸ *Abbott v. N. Y., etc., R. Co.*, 145 Mass. 450, 15 N. E. 91.

pass to a foreign company which by deed succeeds to its rights and powers without the legislative consent: yet, if for twenty years, the state had dealt with the company on the assumption that it had succeeded to all the rights of its predecessor, had advanced it a large sum of money and had allowed it to mortgage the road and sell bonds in the market, a presumption of the assent of the legislature would prevail.⁴⁹

§ 156. Same continued—consolidation—agency.

It seems not an unusual thing for large telegraph and telephone companies to utilize small companies in order to carry out their business.⁵⁰ A telegraph company resulting from the consolidation of companies created by different states becomes a domestic company in each of them; and the powers which each of its constituents were authorized to exercise in the particular locality descends to it. So, if its local predecessor has the right of eminent domain the consolidated company will not be barred from exercising it, because it consists in part of a foreign company.⁵¹ Some of the courts have gone further, and hold that it is not necessary that there should be a consolidation, but that it is subordinate to the foreign company, and is only to assist it in carrying out its object.⁵² In other words, it may be nothing more to the foreign company than a mere agent;⁵³ yet, however, this rule has not been followed by all the courts. Thus, it was held, that such company will not be permitted to evade this provision, and do indirectly what it may not do directly by acquiring a right of way, through the agency of a domestic company.⁵⁴

⁴⁹ *Abbott v. N. Y., etc., R. Co.*, 145 Mass. 450, 15 N. E. 91.

⁵⁰ *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

⁵¹ *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Abbott v. N. Y., etc., R. Co.*, 145 Mass. 450, 15 N. E. 91; *Trester v. Missouri Pac. R. Co.*, 36 N. W. 502.

⁵² *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 104 Fed. 623, affirming (C. C. A.) 111 Fed. 842; *Union Pac. R. Co. v. Colorado Postal Cable*

Co., 30 Colo. 133; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Day v. Postal Tel. Co.*, 66 Md. 354.

⁵³ *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

⁵⁴ *State v. Scott*, 22 Neb. 628, 36 N. W. 121; *Trester v. Missouri Pac. R. Co.*, 23 Neb. 242, 36 N. W. 502; *Koeing v. Chicago, etc., R. Co.*, 27 Neb. 699, 43 N. W. 423.

§ 157. Same continued—general and special laws.

While the above rule is the general law applicable to foreign corporations, exercising the right of eminent domain, without their state of incorporation, yet the same is applied to foreign telegraph and telephone companies, seeking to carry on a business in other states: and that, too, whether they are making an effort to condemn the land of some private citizen, or the easement of a public highway, or the right of way of a railroad company. There may be general statutes wherein they acquire the right to exercise this power over private property and public highways, and special statutes with reference to the condemnation of the right of way of railroad companies; or they may acquire the right under both: but where the right is acquired under either of the two statutes,⁵⁵ they should resort to that statute which has particular reference to that class of property sought to be condemned.

§ 158. Must be in good faith.

In order for a telegraph company to be endowed with the authority to condemn the right of way of a railroad company, the same must be done for itself as an incorporated concern, or as an agent for another incorporated company. Thus, it was held that a private person could not condemn land for a right of way for a private business for himself or for another: but that the proceedings could be maintained only by one who is in charge of a public use, and who intends to perform a public service:⁵⁶ although he may exercise the right as agent for some telegraph or telephone company: but in order to do this, his agency must be stated.⁵⁷ A person is not in charge of a public duty if he seeks to condemn the right of way merely to sell the same to a company;⁵⁸ but if the articles of incorporation of the company seeking to exercise the right discloses the fact that it was organized to sell or otherwise dispose of the lines of the telegraph company which it might

⁵⁵ *Koeing v. Chicago, etc., R. Co.*, 27 Neb. 699, 43 N. W. 423.

⁵⁶ *Beveridge v. Lewis*, 137 Cal. 619, 70 Pac. 1083, 92 Am. St. Rep. 188, 59 L. R. A. 581.

⁵⁷ *Beveridge v. Lewis*, 137 Cal. 619.

70 Pac. 1083, 92 Am. St. Rep. 188, 59 L. R. A. 581.

⁵⁸ *Beveridge v. Lewis*, 137 Cal. 619, 70 Pac. 1083, 92 Am. St. Rep. 188, 59 L. R. A. 581.

construct or acquire, and that this fact was in connection with other evidence in the case—as that it was a foreign corporation, and not its honest intention to operate the lines in question, except in the interest of and in connection with that corporation—does not establish in law an intent to take the property for a private use.⁵⁹ What a public use is, is a question of law to be decided by the court,⁶⁰ but when and by what companies the power of eminent domain may be exercised, is to be decided by the legislature.⁶¹

§ 159. What portion of right of way may be taken.

Where the right to condemn the right of way of a railroad company has been conferred upon a telegraph company; the power to select so much of the right of way, as may be necessary for the lines is conferred by implication, subject to the limitation that its selection must not essentially interfere with the operation of the railroad.⁶² When the power to condemn the right of way has been acquired by the telegraph company, there is generally very little dispute between the two companies as to where the line shall be constructed; provided, it is not to be so near to the track as to interfere with the running of the trains, and the carrying on of its general corporate business.⁶³ The

⁵⁹ *Union Pac. R. Co. v. Colorado, etc., Tel. Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

⁶⁰ Judicial notice will be taken that a public telegraph line is a public improvement, for which property may be taken for a public use. *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 24 So. 408.

⁶¹ *Chicago, etc., R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918, and extensive note thereunder.

⁶² *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 24 So. 408; *Savannah, etc., R. Co. v. Postal Tel. Cable Co.*, 112 Ga. 941, 38 S. E. 353; *Savannah, etc.,*

R. Co. v. Postal Tel. Cable Co., 115 Ga. 554, 12 S. E. 1. See, also, *St. Louis, etc., R. Co. v. Southwestern Tel., etc., Co.*, (58 C. C. A. 198) 121 Fed. 278.

⁶³ *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Railway v. Pitty*, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434n; *Englewood Connecting R. Co. v. Chicago, etc., R. Co.*, 117 Ill. 611, 6 N. E. 684; *O'Hare v. Railroad Co.*, 139 Ill. 151, 28 N. E. 923; *Stork v. Railroad Co.*, 43 Iowa 501; *Peorey v. Railroad Co.*, 30 Me. 498; *Fall River Iron Works Co. v. Oil Colony, etc., R. Co.*, 5 Allen. 222; *Railroad Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84; In the matter of *New York R. Co.*, 46 N. Y. 546, 7 Am. Rep.

most difficult question is, What shall be the amount of damages to be awarded? And after this has been determined, the portion of the right of way to be taken for the telegraph lines is easily solved.

§ 160. Nature of petition.

The nature of a petition presented asking the condemnation of a portion of the right of way of a railroad company, should be very similar, in most respects, to a petition filed, praying the condemnation of private property, or part of a public highway for telegraph and telephone companies. It will be unnecessary therefore to enumerate again the essential parts of a petition; yet some of those parts, which have been spoken of heretofore, may be somewhat differently alleged in a petition for the condemnation of a right of way of a railroad company. For instance, it is not necessary to give as full a description of the route of the contemplated company, or the property to be condemned, as that given in a petition, praying for the condemnation of private property; because the route has already been most thoroughly described, when the property was condemned for the railroad company's right of way, and of which there are accessible records.⁶⁴ If the fact is alleged that the property is that of a railroad company, running between certain termini, within certain counties; setting forth the amount of ground needed for each pole; the distance of the poles from each other; and the distance they will be from the railway track, the way desired will be sufficiently described.⁶⁵ It need not designate the exact positions to be occupied by the poles, nor the side of the track to be used, nor that existing lines of telegraph will be displaced, nor the quantity or specific description of land to be taken.⁶⁶

385; *Kansas, etc., R. Co. v. Northwestern, etc., Co.*, 161 Mo. 288, 84 Am. St. Rep. 719, 61 S. W. 684, 5 L. R. A. 936.

⁶⁴ *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705. A railroad track is a fixed monument.

Lake Shore, etc., R. Co. v. Pittsburg, etc., R. Co., 71 Ill. 40.

⁶⁵ *Postal Tel. Cable Co. v. Oregon Shore Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 St. Rep. 705.

⁶⁶ *Mobile, etc., R. R. Co. v. Postal Tel. Cable Co.*, 24 So. 408.

§ 161. Same continued—necessity for taking.

There seems to be some doubt prevailing among the courts as to whether the petition should allege the fact of the necessity of taking the land for the right of way; but the weight of authority—which we think to be correct—is that it is not necessary to specifically allege this fact, as the same will be implied.⁶⁷ There are states whose constitutions expressly require this question to be submitted to, and determined by a jury;⁶⁸ and where this is the case, there can be no doubt that it must be done. There are cases, too, which, in a general way, have spoken of the question as if it were a constitutional one; and that because there is no authority in the legislature to take land of a private person or corporation, except for public use, he necessarily must have the right to a judicial determination as to the necessity of the taking in any particular instance.⁶⁹ Whether this be true or not, it is not necessary in the absence of a constitutional or statutory provision to that effect, to submit the question to the determination of a jury. It may doubtless be referred for decision to a court, or to commissioners appointed for that purpose by the court, and acting under its supervision and subject to its control; but if it is not presented for such determination before the appointment of commissioners, it will be presumed to have been waived.⁷⁰ When the necessity, therefore, exists for the taking—whether it be alleged specifically in the petition, or whether it is implied therein—it is not a question whether there is other land to be had equally available; but the question is, Whether the land sought is needed for the construction of the public work?⁷¹ In other words, it is not necessary to allege in the petition, that the land sought to be condemned is the only available land to be had; but the reason, that this particular land

⁶⁷ *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 24 So. 408; *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Lynch v. Forbis*, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402, and note.

⁶⁸ *People v. Village of Brighton*, 20 Mich. 57; *Power's Appeal*, 29 Mich. 509.

⁶⁹ *Leconl v. Patie Jury*, 20 La. Ann. 308; *New Orleans, etc., R. Co. v. Gray*, 32 La. Ann. 471.

⁷⁰ *Heyneman v. Blake*, 19 Cal. 579.

⁷¹ *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 24 So. 408.

is sought to be condemned, is sufficient averment that it is the most available to be had; and this fact, of itself, is, in our mind, a sufficient averment of the fact of the necessity of the taking of this land. There may be other lands available, but if the railroad company refuses a bona fide offer to negotiate for the use of land in its right of way for a telegraph line—and it must be alleged, as has been shown, that an unsuccessful attempt to acquire this land by agreement has been made—a necessity exists for the taking of this particular land.⁷²

§ 162. May condemn land in several counties in one proceeding.

Where the railroad traverses several counties in a state, and a telegraph company is seeking to condemn its right of way for a line of wires, the same may be done in one proceeding. While the general rule is that lands belonging to different individuals residing in the same county may be condemned in one proceeding,⁷³ yet the rule should receive a much greater indorsement where the land belongs to only one person, as in the case of a right of way of a railroad company: since it would be much easier to serve notice on the latter, than it would be in case there were several owners. To our certain knowledge, we cannot say whether the question has been settled by the courts with respect to one proceeding settling the rights of several different original landowners living in different counties, for their respective damages against the telegraph company for additional burdens to the land on which the railroad company's right of way is laid out: but we are of the opinion there would have to be different proceedings brought against the landowners in each county: however, all the landowners in one county could be made parties defendant in one proceeding. Where the proceeding is merely for the condemnation of the right of way of a railroad company, traversing several counties within the same state, there is no question that the same can be done by one proceeding. The damage which the railroad company is entitled to is for the whole property, and the cause of action arises in all the several counties as a unit. The county line crossing the rail-

⁷² Postal Tel. Cable Co. v. Oregon Short Line R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705.

⁷³ State v. Central New Jersey Tel.

Co., 35 Am. & Eng. Corp. Cas. 1; Houghton Com. Council v. Huron Copper Mining Co., 9 Am. & Eng. Corp. Cas. 315.

road company's right of way does not destroy the singleness of its use.⁷⁴

§ 163. Same continued—constitutional.

The statutes of some states provide that telegraph or telephone companies desiring to exercise the right of eminent domain over a railroad company's right of way may institute the proceedings "in any county through which the railroad may run;" or, "all proceedings under this chapter must be brought in the district court for the county in which the property or some part thereof is situated."⁷⁵ These provisions do not, however, conflict with that section of the constitution which provides in effect that all civil and criminal business arising in any county must be tried in such county. The meaning of this constitutional clause, as was held,⁷⁶ is, that actions affecting realty shall be tried in the county where the business or the causes arise; or if the cause of action arises in more counties than one, then in either of said counties. The object in permitting one proceeding to settle damages arising from the condemnation of the right of way of a railroad company traversing several counties is to avoid trouble and expense in instituting proceedings in each of the several counties, when the property which belongs to one proprietor and is contiguous and used together for a common purpose, can be considered in one proceeding.

§ 164. Who may be appointed as commissioners and how.

The statutes which give the power to telegraph companies the right to condemn the right of way of a railroad company for its line, generally provide the manner in which the commissioners are appointed, and their qualifications. In substance, these statutes provide that on filing the petition by the parties seeking to appropriate the right of way for their use, a writ must be issued by the clerk of the court in which the petition is filed, commanding the sheriff to summon a certain number of good and lawful men to appear at the office of said clerk or at or near the property to be condemned. From this number

⁷⁴ Postal Tel. Cable Co. v. Oregon Short Line R. Co., 23 Utah, 474, 65 Pa. 735, 90 Am. St. Rep. 705.

⁷⁵ Laws of Utah.
⁷⁶ Desert Irr. Co. v. McIntyre, 16 Utah 368, 52 Pac. 628.

each party has the right to select a certain equal number; those selected by both parties should choose another party from among those summoned, and these constitute and compose the commission. The number to be summoned by the sheriff is not the same in all statutes: some provide that nine be summoned and that two be selected by each of the parties to the proceeding, who in turn, choose another; other statutes provide for not so many; still others provide for more. In other words, these statutes differ with respect to the number, but the provision is always arranged so that there shall be an odd number composing the commission. Some statutes provide that the commissioners shall be appointed by the court; but it seems to us the better policy to give the appointive power to the parties to the suit, as above shown. The commissioners should be good and lawful men; and where the record, which the clerk is required to keep, shows that the men summoned by the clerk were good and lawful men, this is sufficient evidence of that fact, although the sheriff's return does not show that they possessed those qualifications, as required by the precept under which they were summoned.⁷⁷ They must be citizens of the county in which the petition is filed; and, in case the proceeding is in one suit to condemn the right of way of a railroad company traversing several counties, the commissioners should be citizens of the county in which the petition is filed, and that through which the road runs. They should also be disinterested parties; and sometimes the charter of the company provides that the commissioners should have this qualification: where this is the case, and it does not appear anywhere in the proceedings that the commissioners were disinterested, the same will be void and of no effect;⁷⁸ but if the statute, or the company's charter, should both fail to have such a provision, the qualification would still be necessary. They should be qualified electors of the county in which they are then residing, and this qualification embraces the fact that they should be intelligent men, and in some instances statutes require that they be property-holders.

§ 165. Duty of commissioners.

The duties of the commissioners, who are appointed to inspect the premises for the purpose of determining the amount of damages

⁷⁷ Louisville, etc., R. Co. v. Postal Tel. Cable Co., 68 Miss. 806, 10 So. 74. ⁷⁸ Madden v. Louisville, etc., R. Co., 66 Miss. 258, 6 So. 181.

which are to be awarded for the property condemned, are generally regulated by the statutes on this subject. The following may be mentioned as some of their duties after the oath has been administered to them to well inquire and true assessment make of the due compensation for cash value and actual damage which the railroad company shall be entitled to receive for the appropriating of the property: They may, hear testimony of witnesses offered by either party as to the cash value of the land sought to be appropriated; and the injury resulting to such railroad company, as the necessary and immediate consequence of the appropriation sought to be made: but in taking such testimony, none should be admitted with reference to uncertain or remote benefits or disadvantages that may or may not occur in the future; neither should any evidence be received in respect to the title or ownership of the property; nor upon any question other than that of the cash value of lands sought to be appropriated by the telegraph company. They cannot determine the question of public use, nor the question of necessity for the taking; except as to the amount of land or the width of the right of way.⁷⁹ All of this testimony should be taken down in writing. They may sit from day to day until their investigations and other duties are completed, and after making their award, which may be done by a majority of the commissioners, they shall make and sign a report of their proceedings in the premises and deliver the same to the sheriff, who shall make an immediate return thereof with the writ and his actions thereon to the clerk of the county court. There may be other duties which the commissioners are to perform, but it will hardly be necessary to enumerate them here. However, it may be well to make mention of another duty which is of the highest importance and imposed upon all who are intrusted and empowered with the authority to assess damages for the appropriation of private or public property for public work: that is, they must *faithfully and honestly* perform all duties imposed upon them as commissioners.

§ 166. Special court for.

In some states, the statutes thereof provide for the proceeding to be had before a special court for that purpose, consisting of a justice of

⁷⁹ Union Pac. R. Co. v. Colorado Postal Tel. Cable Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.

the peace and a jury. The manner in which the proceedings are begun is somewhat similar to that under a commissioner's court. As for instance, the telegraph company must file its petition with the clerk of the county court in which the proceedings are begun, after which the clerk issues a summons to a justice who is to try the cause; summonses are also issued for a jury, whose names are usually drawn from the regular jury box, to appear at a certain time and place for the purpose of serving as jurors; and the railroad company is also summoned to appear at that time to defend the cause. The court is organized and conducted as other courts, and only such evidence can be admitted as that which is admissible in a commissioner's court. The judgment and verdict of the court has the same effect and is enforced as in these courts. In fact, there is very little difference between the procedure of a commissioner's court and that of the special court provided for in the condemnation of a right of way of a railroad company for the lines of a telegraph company; and for this reason this particular court will not be further considered.

§ 167. The award of commissioners.

The award of commissioners in condemnation proceedings operates as a judgment between the parties and is governed by the same rules that are ordinarily applied to judgments of courts. Such an award, or a verdict and judgment on appeal therefrom, has the same force as an ordinary judgment rendered by a court of competent jurisdiction.⁸⁰ It is conclusive upon the parties and privies, unless an appeal be taken. This is plainly the intent of the statute, for the institution of this tribunal would be useless unless their estimate should be regarded as final.⁸¹ Any other view of the question would lead to

⁸⁰ *Charleston, etc., R. Co. v. Hughes*, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17; *Postal Tel. Cable Co. v. Louisville, etc., R. Co.*, 9 So. 119; *Aldrich v. Cheslie R. Co.*, 21 N. H. 359, 53 Am. Dec. 212; *Louisville, etc., R. Co. v. People's St. R., etc., Imp. Co.*, 13 So. 308; *Memphis, etc., R. Co. v. Birmingham, etc., R. Co.*, 11 So. 642; *Newton v. Ala., etc., R. Co.*, 13 So.

259; *McCulley v. Cunningham*, 11 So. 694; *New Orleans, etc., R. Co. v. Rabasse*, 10 So. 708; *Atchison, etc., R. Co. v. Boerner*, 34 Neb. 240, 51 N. W. 842, 33 Am. St. Rep. 637; *Atchison, etc., R. Co. v. Forney*, 35 Neb. 607, 37 Am. St. Rep. 450, 53 N. W. 585.

⁸¹ *Postal Tel. Cable Co. v. Ala., etc., R. Co.*, 8 So. 375.

great practical difficulties, for if we could go behind their assessment, it would be impossible to draw any line beyond which we should not proceed. There would be scarcely any injury a landowner or a railroad company could sustain which might not be said, with more or less plausibility, to be one which the commissioners could not take into consideration.⁸²

§ 168. May have new award.

These statutes provide that on good cause shown, either by the telegraph or railroad company, by motion to the circuit court of the district in which the proceedings were had, a new inquiry and assessment may be had. It is necessary that these motions should state the grounds upon which said inquiry is asked, and supported by an affidavit of the party applying therefor, in which it should be stated that the award of the commissioners was contrary to the law and evidence. A new inquiry does not follow as a matter of course, either from the fact that illegal testimony was heard or that a party was wrongfully denied the right to open and conclude the argument.⁸³ A copy of all the proceedings had in the case, including a copy of all the evidence, should be filed with the motion. And after the opposite party has had proper notice of said motion, the court should consider the same. If the court should be of the opinion that the commissioners acted upon testimony which was irrelevant, immaterial or incompetent, that the award was contrary to the law and the evidence, and that injustice has been done, a new hearing and assessment should be ordered by said court. The court being of the opinion that a new award should be had on said motion, should order a new writ to issue and another trial and assessment to be had. There are generally some limitations and conditions provided for in the statutes which must be complied with. For instance, it is provided that not more than one inquiry and assessment shall be allowed at the instance of the same party in reference to the same matter; and, that in case an appeal be taken from the decision of the court to the supreme court, the same must be done within a limited time—generally about thirty days—but an appeal shall not hinder or delay the telegraph company from

⁸² *Aldrich v. Cheshire R. Co.*, 21 N. H. 359, 53 Am. Dec. 212.

⁸³ *Postal Cable Co. v. Ala., etc. R. Co.*, 8 So. 375.

constructing and operating the lines over the right of way of the railroad company, after it has paid or tendered the amount of award for which they are considered to be entitled.

§ 169. Same as in other condemnation proceedings.

The foregoing rule in regard to the nature of condemnation proceedings of a telegraph company for the use of a right of way of a railroad company for its lines, is equally applicable in cases brought by the same companies for the condemnation of private or public property for a right of way. Of course, there is a little variance in the rule in some cases, but this may be easily detected and guarded against.

§ 170. Duty the company owes to the railroad company.

After a telegraph company has acquired the right to construct a line of wires upon the right of way of a railroad company, and the same has been or is being done, there are certain duties which it owes to the latter and to other companies of similar nature. For instance, the wires should be so constructed as not to interfere with the moving of trains, or any other business of the railroad company. As mentioned heretofore, telegraph companies, when constructed upon the right of way of a railroad company, stand in a subordinate position to the latter in respect to its right of way. The poles should be of sufficient size and planted sufficiently deep in the ground so as not to endanger the public; and they should be high enough where the wires cross the railroad track as not to interfere with the running of trains.⁸⁴ The wires should not be attached to any of the railroad company's fixtures, nor should the poles be erected upon its embankments; nor should the wires interfere with other telegraph lines.⁸⁵ They should take the necessary steps and precautions for the protection of their property from fire and for the operation of their lines.⁸⁶ The wires should be properly insulated for their own protection as well as for the public. In case the railroad company should enlarge

⁸⁴ Mobile, etc., R. Co. v. Postal Tel. Cable Co., 24 So. 408.

etc., R. Co., 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 735.

⁸⁵ Postal Tel. Cable Co. v. Oregon,

⁸⁶ Postal Tel. Cable Co. v. Louisville West. R. Co., 22 So. 219.

its business so that it became necessary to take more or all of its right of way, and to do so would necessitate the removal of the line, the telegraph company should make such removal, at its own expense, after proper notice to that effect had been given.

§ 171. The measure of damages—extent of injury.

The next thing to be considered is the measure of damages to be awarded a railroad company by the telegraph company for the construction of a line of its wires over the former's right of way. The only interest which a railroad company acquires in, and the only purpose to which it can use its right of way, is such, only, as may be necessary to carry on the railroad business; but everything which may be necessary to do this may be done. It cannot sell, transfer, encumber or use the right of way, except as its necessities and conveniences may demand for the proper operation of its road. It cannot license the appropriation of any part of such right of way to private business purposes, nor to public purposes except so far as may be needful and helpful in the operation of the road itself.⁸⁷ A telegraph company does not under a condemnation proceeding acquire a fee to the land, but only an easement thereon to carry on the business of telegraphy.⁸⁸ It cannot use the land for any other purpose. The company cannot take possession of it or use it for any other purpose than to erect poles and suspend wires thereon. The company will have the right to enter upon that portion of right of way which is between the telegraph poles and under its wires, for the purpose of repairing its lines; but the telegraph company has no right to exclude the railroad company from the use of this land. The ownership of the railroad company to the roadbed remains as it was before, while the telegraph company merely acquires an easement upon what it condemns, for the purpose of entering thereon to erect and repair the lines.⁸⁹ Therefore, taking these facts into consideration, the extent of injury for which damages shall be awarded is very small, and even approaches that injury which courts refuse to notice, although it is held by some of the

⁸⁷ Jones on Easements, § 383.

⁸⁸ Union Pac. R. Co. v. Colo., etc., R. Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106.

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⁸⁹ St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Chicago, etc., R. Co. v. City of Chicago, 166 U. S. 248, 17 Supt. Ct. 581.

courts that the railroad companies are entitled to practically nominal damages, at least, for such use of their right of way.⁹⁰

§ 172. Same continued—expense incurred—no reason.

It has been said with much earnestness and with some degree of plausibility, that it would be unjust to allow a telegraph company to plant its poles along the right of way when the railroad company had expended thousands of dollars to clear and keep it free from obstructions, and yet pay nothing for the privilege. But this view is more specious than sound, for the railroad must incur this expense for its own purposes, whether the telegraph line is there or not, and must keep the right of way clear of obstructions, whether it is occupied by a telegraph line or not: so, there is no greater burden or expense, because of the presence of the telegraph lines.⁹¹ In one state, in particular, this reasoning is not held sound.⁹² In this state, the amount of damages allowed the railroad company has been fixed at the sum which it originally cost to clear eight feet—that being the width of the cross-arms on the telegraph line—of the right of way, plus the sum which would yield an annual interest sufficient to keep that portion of the right of way clear.

§ 173. Same continued—measurement—true rule.

We presume it is an undisputed fact that the railroad company loses no interest to its right of way but that it may be used for any purpose necessary and convenient for carrying on all business per-

⁹⁰ *Postal Tel. Cable Co. v. Oregon, etc., R.*, 104 Fed. 623, affirming (C. C. A.), 111 Fed. 842 (\$500 for a distance of 200 miles); *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 248, 17 Supt. Ct. 581; *St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 101 Tenn. 62, 41 L. R. A. 403; *Gulf, etc., R. Co. v. Southwestern Tel., etc., Co.*, 52 S. W. 87; *Southwestern Tel., etc., Co. v. Gulf, etc., R. Co.*, 52 S. W. 107; *Texas, etc., R. Co. v. Postal Tel. Cable Co.*, 52 S. W. 108;

San Antonio, etc., R. Co. v. Southwestern, R. Tel. etc., Co., 56 S. W. 201; *Texas Midland R. Co. v. Southwestern Tel., etc., Co.*, 57 S. W. 313.

⁹¹ *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 248, 17 Supt. Ct. 581.

⁹² *Postal Tel. Cable Co. v. Louisville Western R. Co.*, 49 La. Ann. 1270, 22 So. 219. See, also, *Postal Tel. Cable Co. v. Morgan's Louisville, etc., R. Co.*, 49 La. Ann. 58, 21 So. 183; *Southwestern Tel. Co. v. Kansas City, etc., R. Co.*, 109 La. 892.

taining to railroading; on the other hand, the telegraph company becomes subordinate to and is dependent on the rights of the former company, with respect to the uses of its right of way; by reason of which their lines may be removed from the right of way of the railroad company, if it is necessary for the latter to carry out its duties. Therefore, it seems that damages by reason of the probability of the railroad company using all of its right of way in the future for an enlargement of its railroad facilities, would be too remote and should not be allowed.⁹³ It is true, also, that the telegraph company actually occupies a very small space of the railroad company's right of way, the poles occupying a space of ground, on the average, of eighteen inches and about one hundred and seventy-five feet from each other, and about thirty feet from the outside track. And while the wires are stretched over and cover a space all along the right of way of about eight feet, yet this can only be used by the telegraph company for the purpose of entering thereon to construct and maintain the line; therefore, in most instances the damages would practically be nominal; however, this would not always be the case. There is no question but that the railroad company is entitled to damages; since, if its property should be taken for a public use without making due compensation for same, this would clearly be unconstitutional.⁹⁴ How much damages, and the manner in which the measurement is to be made, seems to be the question most often confronted and least seldom understood. The following rule—and one we think to be clearly correct—has been held to be the measure of damages to which a railroad company is entitled for the use of its right of way by a telegraph company: "The measure of damage . . . suffered by a railroad company is not the value of the land embraced within the right of way between the poles and under the wires, but the measure of damages is the extent to which the value of the use of such spaces by the railroad company is diminished by the use of the same by the telegraph company for its purposes."⁹⁵ The railroad company cannot sell, incumber, transfer or use its right of way except as may be

⁹³ Chicago, etc., R. Co. v. Chicago, 166 U. S. 248, 17 Supt. Ct. 581.

⁹⁴ Mobile, etc., R. Co. v. Postal Tel. Cable Co., 24 So. 408.

⁹⁵ St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill. 508, 51 N. E. 382; Mobile, etc., R. Co. v. Postal Tel. Cable Co., 26 So. 370.

necessary for the proper operation of the roads: therefore, any supposed market value of this land cannot be considered in determining the measure of damages to be awarded the railroad company; but the value of this space must be determined by the use to which it is applied. And in determining this last question, the value of the use of this space must be such as that for which the railroad company may apply it, and not the value of the use for which the telegraph company may apply the same; for the value of the use in the latter may be greater than that in the former. And as the railroad company cannot speculate upon the value of its right of way, it could only recover such damages for the appropriation of such space as the value of the use of same for railroad purposes had been decreased or diminished.⁹⁶

§ 174. Exclusive right—on railroads.

There seems to be some conflict of opinion among the courts as to whether a telegraph company can acquire, either by a contract with the railroad company or by legislative grant, an exclusive right to construct a line of wires along and upon the right of way of a railroad company; but the great preponderance of authority is that such rights cannot be acquired.⁹⁷ The act of Congress⁹⁸ granting to a telegraph company the right to construct a line of wires along post-roads did not give it the sole right to construct a line over the right of way, so as to exclude other companies whose lines would not interfere with those of the first company;⁹⁹ and this act prevents the telegraph company from acquiring an exclusive grant in any manner.

§ 175. Contract with railroad company to that effect.

This act of Congress prevents a telegraph company from acquiring the exclusive right to construct a line upon the right of way of a rail-

⁹⁶ *I. C. R. Co. v. Chicago*, 141 Ill. 509, 30 N. E. 1046; *Chicago, etc., R. Co. v. Chicago*, 149 Ill. 457, 37 N. E. 78, 166 U. S. 226, 17 Sup. Ct. 581; *Lewis, Em. Dom.*, § 485.

⁹⁷ *U. S.—West. U. Tel. Co. v. Baltimore, etc., Tel. Co.*, 19 Fed. 660, 22 Fed. 133, 23 Fed. 12; *West. U. Tel. Co. v. American U. Tel. Co.*, 9 Bliss (U. S.) 72. Compare *West U. Tel.*

v. Atlantic, etc., Tel. Co., 7 Bliss (U. S.) 367.

New Mexico.—Union Trust Co. v. Atchison, etc., R. Co., 8 N. Mex. 327, 43 Pac. 701.

Ohio.—Marietta, etc., R. Co. v. West. U. Tel. Co., 38 Ohio St. 24.

⁹⁸ Under U. S. Rev. Stat., § 5263.

⁹⁹ *West. U. Tel. Co. v. American U. Tel. Co.*, 9 Bliss (U. S.) 72.

road company by a contract entered into with the latter to that effect; and yet, this is not the only reason why such a contract could be held invalid. The state's right to exercise the power of eminent domain extends over every foot of land within its borders; so, the title acquired by any corporation, under the power of eminent domain, is held subject to the rights of the state. As has been seen, property held by a corporation acquired under the right of eminent domain may itself be again condemned for other public purposes: as where the right of way of a railroad company may be condemned for the right of way of another railroad company, or for the use of a line of telegraph wires. If a railroad company could acquire a right, under its condemnation proceedings, to contract with a telephone company, so as to give the latter an exclusive right to construct a line on its right of way, the state could not, of course, under such circumstances, grant the power to another company: it, therefore, follows that it would be divested to the extent of such property, of its power of eminent domain: but of this it cannot be divested.* The natural conclusion is that the railroad can have no power to grant such exclusive right. Again, the right of way of a railroad company was acquired for certain specific purposes; and for this reason the company could not use this property for any other purpose except that for which it was acquired. It is never contemplated in the grant of such property that it will use it except for the purpose of constructing a track thereon, and for such other structures and uses necessary and incident to the operation of its road. For instance, it could not sell or encumber the property, or even construct a line of telegraph thereon, unless the same was done for the express purpose of carrying on its railroad business. An attempt to grant to another company a power which it cannot exercise itself, or an attempt to add an unlimited franchise to one which is limited, would be nothing less than an attempt to do something beyond its power.¹⁰⁰ It has been further held that such contracts could not be held valid, as they would be in restraint of trade because creating monopolies which are prohibited both by the common and statutory laws.¹⁰¹

¹⁰⁰ *Mercantile Trust Co. v. Atlantic*
etc., R. Co., 63 Fed. 910.

¹⁰¹ *Mobile, etc., R. Co. v. Postal Tel.*
Cable Co., 26 So. 370.

§ 176. State legislation—no exclusive grant.

Not only is a railroad company prohibited from granting exclusive privileges to a telegraph company to construct a line upon its right of way, but the right cannot be granted by state legislation.¹⁰² The right acquired from the state by the telegraph companies to do business as a corporation is in the nature of a contract, carrying with it a delegated authority to condemn private and public property for a right of way; but this inherent delegated power, does not carry with it immunity from future legislations. In other words, it does not enter into and become a part of the contract made between the state and the incorporators, whereby the latter acquires the right to construct and maintain a public telegraph line, so as to protect it under that clause of the constitution which prohibits the passing of a law impairing the obligation of contracts. As was very ably observed on this point by Cooley: "Any legislative bargain in restraint of the complete continuance and repeated exercise of the right of eminent domain is unwarranted and void; and that provision of the constitution of the United States which forbids the state violating the obligation of contracts could not be so construed as to render valid and effectual such a bargain, which originally was in excess of proper authority."¹⁰³ The right of eminent domain is an element of sovereignty, and a contract in restraint of a free exercise of this right is not obligatory on the state, and does not fall within the inhibition of the constitution of the United States.¹⁰⁴ The right to exercise the power of eminent domain is an inherent power and one from which the state cannot be divested, and it has the right to exercise this power over every foot of land, whether held by private citizens or corporations: so, if it could possibly grant an exclusive right to a telegraph company to construct its lines upon the right of way of a railroad company, it would necessarily be divested of this power.

¹⁰² *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1, affirming 2 *Woods (U. S.)* 643; *Muskogee Nat. Tel. Co. v. Hall* (55 C. C. A. 536), 118 Fed. 382.

¹⁰³ *Cooley Const. Lim.* (3 Ed.), 525; *Railroad Co. v. Railroad Co.*, 97 Ill.

506; *West River Bridge Co. v. Dix*, 6 How. 531.

¹⁰⁴ *Hyde Park v. Oak Woods Cemetery Association*, 14 Am. & Eng. Corp. Cas. 417.

§ 177. Act of Congress—prohibits exclusive right.

"Any telegraph company organized under the laws of any state, shall have the right to construct, maintain and operate telegraph lines over any part of the public domain, over and along any of the military or post-roads of the United States, . . . provided, etc.;¹⁰⁵ . . . and any such company may take from the public lands through which its line passes, the necessary stone, timber and other material for its poles, stations or other needful uses in constructing its lines."¹⁰⁶ In view of these statutes, a state cannot grant to a telegraph company exclusive rights in the right of way of a railroad company within the state. The statute amounts to a prohibition of all state monopolies in this particular.¹⁰⁷

§ 178. Same continued—contra view—lines on same poles.

While the above is the general and accepted rule, yet there are some courts which hold that a telegraph company can acquire an exclusive privilege to construct a line of wires upon the right of way of a railroad company.¹⁰⁸ We see no reason why a contract made between a railroad and a telegraph company for exclusive rights should be void, in so far as it merely excludes competitors from the line of poles erected and used by the telegraph company.¹⁰⁹ For instance, a telegraph company may be enjoined from constructing a line of wires upon the poles of another telegraph company which has acquired from the railroad a contract to have exclusive privileges along the right of way so far as may be legally done; but there is no reason why the other company may not construct and maintain another line of poles along the track of the railroad company.¹¹⁰ A railroad company, maintaining telegraph wires, granted to a telegraph company the right to place a wire on the poles of the former, and to establish stations and do business with points off the road, the railroad com-

¹⁰⁵ U. S. Rev. St. § 5263.

¹⁰⁶ U. S. Rev. Stat. § 5264.

¹⁰⁷ *Pensacola Tel. Co. v. West*, U. Tel. Co., 96 U. S. 1, affirming 2 Woods (U. S.) 643.

¹⁰⁸ *Canadian Pac. R. Co. v. West*, U. Tel. Co., 17 Sup. Ct. Can. 151, 33 Am. & Eng. Corp. Cas. 1; *Marietta, etc., R.*

Co. v. West, U. Tel. Co., 38 Ohio St. 24.

¹⁰⁹ *West. U. Tel. Co. v. Chicago, etc., R. Co.*, 86 Ill. 246, 29 Am. Rep. 28. See *Merriweather, etc., R. Co. v. West*, U. Tel. Co., 38 Ohio St. 24.

¹¹⁰ *West. U. Tel. Co. v. Chicago, etc., R. Co.*, 86 Ill. 246, 29 Am. Rep. 28.

pany reserving for itself the right to local business; it was held that the right granted was not exclusive, and that the railroad could put up and maintain another wire for its own use or for the use of a third party;¹¹¹ and it was further held, in another case, that exclusive privilege could be granted to a telegraph company between certain points.¹¹²

§ 179. Municipal grants—exclusive—cannot grant.

As the legislature cannot grant to a telegraph company an exclusive franchise to construct a line of wires along the right of way of a railroad, it cannot delegate this power to a municipality, which, in turn, grants the rights to such companies.¹¹³ Courts in construing such grants made by municipalities place such constructions thereon as will prevent the exclusion of new companies.¹¹⁴ Courts will not readily interfere at the instigation of one company occupying a street to prevent its use by another company; but if the interference is unreasonable and unnecessary, the company may be enjoined;¹¹⁵ and this suit may be brought by either party being interfered with. For instance, a new company may enjoin a company already occupying the streets from unreasonably raising the height of its poles so as to interfere with the construction of a new line.¹¹⁶

§ 180. Vested rights—cannot be impaired.

When the ordinance of a city grants to a telephone company the right to construct its line along certain streets on complying with certain conditions, and the same is accepted by said company which has gone to great expense in the construction of its lines, the grant is in the nature of a contract, by which the company acquires a vested right in the street, and the city is prohibited from imposing

¹¹¹ *Marietta, etc., R. Co. v. West. U. Tel. Co.*, 38 Ohio St. 24.

¹¹² *California, etc., Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398.

¹¹³ *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 65 N. E. 329, affirming 100 Ill. App. 57; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 Am. St. Rep. 520, 47 L. R. A. 87n.

¹¹⁴ *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 65 N. E. 329.

¹¹⁵ *Chicago Tel. Co. v. Northwestern Tel. Co.*, 199 Ill. 324, 65 N. E. 329; *Northwestern Tel. Exch. Co. v. Twin City Tel. Co.*, 95 N. W. 460.

¹¹⁶ *Cumberland Tel. Co. v. Louisville Home Tel. Co.*, 72 S. W. 4, 24 Ky. L. Rep. 1676.

other conditions on such companies unless the right to do so is reserved in the grant or by statute, or by the legislature or the constitution.¹¹⁷ The municipalities having the authority to manage and control their streets may, under such powers, stipulate the manner in which the poles and the wires of telegraph companies shall be constructed, and may exercise reasonable control over the manner in which they are maintained. Thus, the city ordinances may require all telephone companies to erect poles of certain size and height, that they be securely placed in the ground at certain distances apart and at designated places on the streets, that the cross-arms be of such a length and so high above the ground, that they be so constructed and maintained as not to interfere with travel along the streets, or to endanger the public safety that they pay a certain license on their business, and many other conditions which it is unnecessary to mention. The power to construct, maintain and carry on a general telephone business is acquired from the state, but as the power to control streets is delegated to the municipality, the condition under which telephone companies are to operate their business in cities must be acquired from or through such cities. Therefore, after a telephone company has been incorporated under the state laws it must acquire the license from the city in which it is seeking to carry on a business. This license or grant accepted by the telephone company is in the nature of a contract. Along with these grants there are certain conditions to be complied with; so, when the grant is accepted by the company

¹¹⁷ *Morristown v. East Tenn. Tel. Co.* (C. C. A.), 115 Fed. 304; *Sunset Tel. Co. v. Medford*, 115 Fed. 202; *Abbott v. Duluth*, 104 Fed. 833; *New Orleans v. Great Southern Tel., etc., R. Co.*, 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533; *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 382, 80 Am. St. Rep. 520, 47 L. R. A. 87n; *Mahan v. Michigan Tel. Co.*, 33 N. W. 629; *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 53 L. R. A. 175; *Bayonne v. Lord*, 61 N. J. L. 136, 38 Atl. 872; *Hudson Tel. Co. v. Jersey City*, 40 N. J. L. 303, 60 Am. Rep. 619; *American U. Tel.*

Co. v. Harrison, 31 N. J. Eq. 627; *People's Pass. R. Co. v. Baldwin*, 14 Phila. (Pa.) 231, 37 Leg. Int. 424; *Com. v. Warwick*, 185 Pa. St. 623, 40 Atl. 93; *State v. Sheboygan*, 114 Wis. 505, 90 N. W. 441. See, also, *Richmond v. Southern Bell Tel. Co.* (C. C. A.), 85 Fed. 19; *Com. v. Boston*, 97 Mass. 555; *Southern Light, etc., Co. v. Board of Alderman*, 153 Mass. 200, 26 N. E. 447. Compare *St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 S. Ct. Rep. 485. See, also, *Northwestern Tel. Exch. Co. v. Anderson*, 12 N. Dak. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771.

and the conditions are complied with, the grant becomes irrevocable unless the right to revoke is reserved. This is especially true when the conditions could not be complied with without undergoing considerable expense; as that the lines shall be constructed of certain designated material and in a certain prescribed manner when it was using a very different kind and in quite a different manner.

§ 181. Same continued—right reserved.

Of course, the right to make any changes in the ordinances under which the license was acquired may be reserved therein; and when this is the case, the company takes the grant subject to the reserved right; but it has been held that a proviso in the ordinance to the effect that "the acts and doings of the company under this ordinance shall be subject to any ordinance or ordinances that may be hereafter passed by the city," does not convert the grant into a mere revocable permit.¹¹⁸ The reserved right may also be provided for in the state constitution or the statutes, and when such is the condition of affairs, they enter into and become a part of the grant from the state and subject the grantees to all such conditions which may be incumbered upon them by a change in the grant or license from a city. Thus, where a telephone company has been incorporated under the state laws which have reserved the right to make such change, alteration, or amendments in the charter of the company, and the license has been acquired to construct a line of wires upon the streets of a city and the company has gone to very great expense in the construction and maintenance of its wires; and, in fact, it has been operating under the license for a number of years, it may, nevertheless, be forced by a legislative change, to that effect, to place its wires underground.¹¹⁹ This illustration may, however, fall under the police power which will be spoken of hereafter, but we use this broad assertion in order to make ourselves understood. When this right to make such changes in the grant as may be necessary to meet the wants and demands of the times is reserved, the right acquired

¹¹⁸ *New Orleans v. Great Southern Tel., etc., Co.*, 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533.

¹¹⁹ *People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893.

by the company is not a vested right, but is accepted subject to such reserved right.¹²⁰

§ 182. Same continued—police power.

By virtue of a delegation by the state to the municipality of its inherent police power, the latter, under such authority, may make reasonable provisions for the peace, safety and convenience of its inhabitants; and such regulations usually concern the use of streets by telephone and telegraph companies. So, under such power, the municipality may make such changes in the original requirements as the welfare of the public may demand.¹²¹ For instance, in the case heretofore cited¹²²—where it was required of a telephone company doing work in a large city, with its network of cables and wires attached to poles, houses, buildings and elevated structures, bringing danger, inconvenience and annoyance to the public, to place these underground—the court, said: “These statutes [having reference to the statutes giving the city the authority] were obviously intended to restrain and control, as far as practicable, the evils alluded to, by requiring all such wires to be placed underground in such cities, and be subject to the control and supervision of local officers who could . . . obviate, in some degree, the evils which had grown to be almost, if not quite, intolerable to the public. The scheme of these statutes was, not to annul or destroy the contract rights of such companies, but to regulate and control their exercise. They did not purport to deny them any privileges theretofore granted, but they did require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute a public nuisance, and should be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible.”

¹²⁰ See note 120.

¹²¹ *Michigan Tel. Co. v. Charlotte*, 93 Fed. 11; *People v. Squire*, 145 U. S. 175, 12 S. Ct. Rep. 880, affirming 107 N. Y. 593, 1 Am. St. Rep. 894; *Norristown v. Keystone Tel., etc., Co.*, 15 Montg. Co. Rep. (Pa.) 9, 12 York Leg.

Rec. (Pa.) 183; *American Tel. Co. v. Millereck Twp.*, 195 Pa. St. 643, 46 Atl. 140. Compare *State v. Sheboygan*, 114 Wis. 505, 90 N. W. 441.

¹²² *People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893.

§ 183. Right to extend lines.

Where a telephone company acquires the license to construct and maintain its line of wires upon the street of a municipality, it may, under the right acquired, extend its lines on the streets within the city. Should the right have been acquired at a time when the municipality was being carried on under the laws applicable to villages, and it is afterwards incorporated and operating under the head of cities, the same right acquired under its authority while it was operating under the first will be upheld under the other;¹²³ and an interference with such vested rights may be enjoined at the instance of the company, or of the trustees in a trust deed executed by it to secure its bonds.¹²⁴

¹²³ Michigan Tel. Co. v. St. Joseph, 121 Mich. 502, 80 N. W. 386, 80 Am. St. Rep. 520, 47 L. R. A. 87n. See,

also, Old Colony Trust Co. v. Wichita, 123 Fed. Rep. 762.

¹²⁴ Old Colony Trust Co. v. Wichita, 123 Fed. 762.

CHAPTER X.

LIABILITY FOR INJURIES CAUSED BY IMPROPER LOCATION, CONSTRUCTION AND MAINTENANCE.

- § 184. Injuries to persons on highways—in general.
- 185. Same continued—*injury on highways.*
- 186. Same continued—*abandonment—no defense.*
- 187. Same continued—*strength and stability of poles.*
- 188. Same continued—*failure to restore line after storm.*
- 189. Same continued—*crossing highways and railroads.*
- 190. Same continued—*falling poles and other fixtures.*
- 191. Obstruction to navigation by cable.
- 192. Negligence—the basis of such actions.
- 193. Negligence—*what constitutes.*
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- 198. Injuries to servants—*under common law.*
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- 200. Must furnish suitable appliances and employees.
- 201. Injury to these companies.
- 202. Interference by other electrical appliances—in general.
- 203. Same continued—*how operated—interference.*
- 204. Same continued—*cause of disturbances.*
- 205. “Inductive” electricity—*meaning of—effect.*
- 206. Same continued—*actions—causes thereof.*
- 207. Same continued—*decision on point.*
- 208. Same continued—*decision on “conduction.”*
- 209. Same continued—*priority of time—induction.*
- 210. Same continued—*priority of time—conduction.*

§ 184. Injuries to persons on highways—in general.

We have, with a good deal of pleasure, discussed at some length the definition of telegraph and telephone companies, their legal status, with respect to the rights of exercising the powers of eminent domain; whether or not they were common carriers; the power of alienating their franchises; and the character of their property. We have also commented upon the rights of way acquired by such companies, giving thereunder the sources from which such rights were acquired, as from the federal and state government, and from municipalities; where the same could be exercised, under what manner and

conditions the same could be had, the effect they would product upon the property acquired, and then, the interest acquired—whether or not it was or could be exclusive and vested. Presuming that all telegraph and telephone companies are comprehended under such definition; that they have thus far acquired all the rights and powers necessary to carry on their business as public institutions and that they have complied with all the requirements necessary to be classed as corporations; we shall now comment upon their liability for injuries caused by all improper location, construction and maintenance of their lines along the highways, to persons using them. After this we shall say something of injuries suffered by their employees.

§ 185. Same continued—injury on highways.

Telegraph and telephone companies must exercise reasonable care not only in the original location and construction of their lines, but must maintain them in such a manner as to prevent injuries to persons using the streets and highways; and on a failure so to do, whereby injury arises, they will be liable for all injuries resulting from such breach of duty.¹ In the first place, these companies must exer-

¹ *England*.—*Holliday v. National Tel. Co.*, 2 Q. B. 302.

United States.—*Sheffield v. Central U. Tel. Co.*, 36 Fed. 164; *Wolfe v. Erie Tel. Co.*, 33 Fed. 320; *Henning v. West. U. Tel. Co.*, 43 Fed. 131; *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810.

Alabama.—*Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 So. 500.

Colorado.—*West. U. Tel. Co. v. Eysler*, 2 Cole 141.

District of Columbia.—*District of Columbia v. Dempsey*, 13 App. Cas. (D. C.) 533.

Illinois.—*Cumberland Tel., etc., Co. v. Coats*, 100 Ill. App. 519 (no negligence shown).

Indiana.—*West. U. Tel. Co. v. Levi*, 47 Ind. 552; *Brush Electric Lighting Co. v. Kelley*, 126 Ind. 220, 10 L. R. A. 250, 5 N. E. 812.

Louisiana.—*Wilson v. Great Tel.,*

etc., Co., 41 La. Ann. 1041, 6 So. 797.

Maine.—*Dickey v. Maine Tel. Co.*, 46 Me. 483.

Maryland.—*Lee v. Maryland Tel., etc., Co.*, 55 Atl. 680.

Massachusetts.—*Thomas v. West. U. Tel. Co.*, 100 Mass. 156; *Sices v. Lowell, etc., St. R. Co.*, 179 Mass. 343, 60 N. E. 974.

Michigan.—*Hovey v. Michigan Tel. Co.*, 124 Mich. 607, 83 N. W. 600; *Keyes v. Valley Tel. Co.*, 93 N. W. 623; *Friesenham v. Michigan Tel. Co.*, 96 N. W. 501; *Chaffee v. Tel., etc., Constr. Co.*, 77 Mich. 625, 18 Am. St. Rep. 424, 6 L. R. A. 455.

Missouri.—*Larkin v. West. U. Tel. Co.*, 82 Mo. App. 155.

New Jersey.—*New York, etc., Tel. Co. v. Bennett*, 62 N. J. L. 742, 42 Atl. 759; *Chalmers v. Patterson, etc., Tel. Co.*, 66 N. J. L. 41, 48 Atl. 991.

cise reasonable care in selecting a proper location on which to construct their lines, and should they carelessly place them upon property for which they have no authority, or if they once had the authority to place them on said property but have since lost it, they become a nuisance with respect to such property, and if an injury is caused thereby, the company will undoubtedly be liable for such injury.² When the location has been properly made, then it devolves upon them to use due care in the construction of their lines, so as not to endanger the public with any faulty material or structure, or the manner in which they are constructed. Not only is it the duty of these companies to properly locate and construct their lines, but they must also use the same degree of care to maintain them as long as they are used as was exercised in their construction. In other words, the location of these lines must be kept properly maintained. Should the location once have been properly selected and for any reason has since been neglected or destroyed, another must be made; and should the material out of which the lines are constructed become old, worn, decayed or cumbersome, it should be removed and the best and most up-to-date structures erected and used in lieu of these. To be more

New York.—Flood v. West. U. Tel. Co., 15 N. Y. Supp. 400; Gordon v. Ashley, 34 Misc. (N. Y.) 743; Leeds v. New York Tel. Co., 64 N. Y. App. Div. 484; Sheldon v. West. U. Tel. Co., 51 Hun (N. Y.) 591. See, also, Ward v. Atlantic, etc., Tel. Co., 71 N. Y. 81, 27 Am. Rep. 10; Leeds v. New York Tel. Co., 32 Misc. (N. Y.) App. Div. 121.

Oregon.—Chaperon v. Portland Gm. Electric Co., 41 Oregon 39, 67 Pac. 928.

Pennsylvania. — Pennsylvania Tel. Co. v. Varnau, 15 Atl. Rep. 624; Central Pennsylvania, etc., Co. v. Wilkerson, etc., R. Co., 11 Pa. Co. Ct. 417.

Rhode Island.—McDonald v. Postal Tel. Co., 22 R. I. 131, 46 Atl. 407.

South Carolina.—Miles v. Postal Tel. Cable Co., 55 S. Car. 403, 33 S. E. 493.

Tennessee.—Postal Tel. Cable Co. v.

Zappi, 93 Tenn. 369, 24 S. W. 633; Cumberland Tel., etc., Co. v. Cook, 103 Tenn. 730, 55 S. W. 152; Cumberland Tel., etc., Co. v. Hunt, 108 Tenn. 697, 69 S. W. 729; United Electric R. Co. v. Shelton, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614.

Texas.—Postal Tel. Cable Co. v. Coate, 57 S. W. 912; Wehner v. Loyerfelt, 27 Tex. Civ. App. 520; Southwestern Tel., etc., Co. v. Ingrands, 27 Tex. Civ. App. 400.

Virginia.—Watts v. Southern Bell Tel., etc., Co., 100 Va. 45, 3 Vt. Sup. Ct. 577, 40 S. E. 107.

West Virginia.—Hammum v. Hill, 52 W. Va. 166, 43 S. E. 223.

Wisconsin.—Roberts v. Wisconsin Tel. Co., 77 Wis. 589, 20 Am. St. Rep. 143, 46 N. W. 800,

² Southern Bell Tel., etc., Co. v. McTyer, 137 Ala. 601, 34 So. 1020, 97 Am. St. Rep. 62.

explicit, the streets and highways should be substantially as safe after they are occupied by these companies as they were before these lines were constructed thereon.³ Telegraph and telephone business being a legitimate one, though involving peril to others, its prosecution with the care that a man of prudence would exercise in view of its character would not entail liability, for injuries which may result, notwithstanding the exercise of such due care;⁴ but the amount of care must be proportionate to the amount of danger and the liability of accident.⁵

§ 186. Same continued—abandonment—no defense.

It is no defense for a company to say that the property which caused the injury has been abandoned or is not in use. For instance, where a person was injured by pieces of cut wire left in the street;⁶ or where the telephone instruments are removed from a building, but

³ *West. U. Tel. Co. v. State*, 82 Maryland, 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 512n.

⁴ *Southern Bell, etc., Co. v. McTyre*, 137 Ala. 601, 34 So. 1020, 97 Am. St. Rep. 62.

⁵ *Ward v. Atlantic, etc., Tel. Co.* 71 N. Y. 81, 27 Am. Rep. 10.

⁶ The court in rendering an opinion on this subject has the following to say: "The same rule would apply when after erections are properly made the company negligently suffers them to fall down or to be out of repair or to remain so after reasonable notice. It was as much its duty safely to maintain as it was safely to erect. Whether the unsafe condition was or was not in its inception the result of a cause for which the company was responsible is only material in determining when the negligence began and in what it consisted. If it was the result of negligent construction this would constitute the negligence. On the other hand if, as in this case, the unsafe condition was the result of a cause for which the company was not at all responsible the

negligence consists, not in the fact that the wires fell into the street, but in the fact that they were allowed to remain there after reasonable notice to the company and the lapse of sufficient time within which to remove them. The duty of the company in such a case it seems to us, is not at all dependent upon the nature of the cause which produced the unsafe condition. So far as the duty of removing the wires from the street was concerned it was immaterial whether their fall was the result of natural decay, of a malicious and unlawful act of some third person, of some extraordinary force of nature, or, as in this case, of the freezing of water thrown upon the cross-bars by the fire department. Nor could the company which had placed its property on a public street under a license from the city, relieve itself of this duty by assuming to abandon it, when from natural wear or sudden casualty it had ceased to be valuable for the purpose for which it had been placed there." *Nicholds v. City of Minneapolis*, 33 Minn. 430, 53 Am. Rep. 56.

instead of removing its wires as suggested by the owner, they are merely cut loose from the instrument and their ends twisted together and left dangling in the building, so that atmospheric electricity, striking somewhere along their course on the outside, will be inducted into the building and there discharged to the peril of persons and property therein;⁷ or where one of its wires becomes broken and is allowed to remain swinging across a feed wire of a street railway company for an unreasonable time, and a person comes in contact with it when charged from the said feed wire and is injured thereby; or if its wires are allowed to remain coiled on the highway an unreasonable time after the company has notice of same, and it frightens teams and causes them to run away and injure any person or property, or if they should become entangled therein to their injury; or if their abandoned property in any way causes an injury to persons or property, the fact of the abandonment of such property cannot be set up as a defense.⁸

§ 187. Same continued—strength and stability of poles.

The strength and stability which poles for telegraph and telephone companies should have, depends somewhat upon the locality in which they are erected, and the number of wires they are supposed to hold. For instance, if there are a great number of wires to be supported, as is generally the case in towns and cities, the poles should be much stronger and more firmly planted in the ground than they otherwise would have to be. The conditions of the country through which they are constructed, with respect to winds and storms, should be considered, since a pole which might be very substantial in a country where there are few, if any, storms, would not be suitable in a country subject to such climatic changes. While these companies are duty bound to the public to have poles with sufficient strength to withstand the changes of the climate which are reasonably expected to be suffered in that particular region, yet they are not bound to construct or manage the lines so as to guard against storms of unusual severity, the

⁷ *Southern Bell Tel., etc., Co. v. McTyer*, 137 Ala. 601, 34 So. 1020; *Fitzgerald v. Edison Electric, etc., Co.*,

200 Pa. St. 540, 86 Am. St. Rep. 732, 50 Atl. 161.

⁸ *Nicholds v. Minneapolis*, 33 Minn. 430, 53 Am. Rep. 56.

occurrence of which could not be reasonably expected. They must, however, be strong enough to withstand such violent storms as may be reasonably expected or such as reasonable foresight and prudence could anticipate.⁹ Not only should the poles be sufficiently strong—and speaking on this subject, the same rule is applied to the cross-arms—at the time they are erected to hold up the wires and endure and withstand anticipated and reasonable climatic changes, but they must also be durable, or made to be such; since, as is well known, the life of these poles is short, if these companies were permitted to allow their poles to become weakened by decay, or, in other words, if they were not duty bound to maintain their lines, they would avoid many responsibilities.

§ 188. Same continued—failure to restore line after storm.

Following the previous statements, it is incumbent upon these companies to restore and repair their lines within a reasonable time after a violent storm, and on failure to do so, whereby injury results, the company will become liable.¹⁰ Broken and hanging wires are dangerous at any time,¹¹ and more especially during thunderstorms. Science and common experience show that wires suspended in the atmosphere attract electricity during storms, and when so suspended and not insulated are dangerous to persons who may at such times be brought in contact with them.¹² True, this may be considered to be a new force of power which interfered, with the production of which the telephone company had nothing to do, but the new force of power here would have been harmless but for the displaced wires; and the fact that the wire took on a new force, with the creation of which the company was not responsible, contributed no less directly to the injury on that account.¹³ Setting aside the dangerous prop-

⁹ *Ward v. Atlantic, etc., Tel. Co.*, 71 N. Y. 81, 27 Am. Rep. 10; *Billinger v. New York, etc., R. Co.*, 23 N. Y. 42; *Mayor v. Bailey*, 2 Denio. 433; *Ricker v. New York, etc., R. Co.*, 64 N. Y. App. Div. 357; *Southwestern Tel., etc., Co. v. Ingrands*, 27 Tex. Civ. App. 400.

¹⁰ *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810; *Cumberland Tel., etc., Co. v. Hunt*, 108 Tenn. 697. See

Fitch v. Central New York Tel., etc., Co., 42 N. Y. App. Div., 321.

¹¹ *Henning v. West. U. Tel. Co.*, 43 Fed. 131.

¹² *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810.

¹³ *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 11 S. Ct. Rep. 859.

sitions arising from thunderstorms these wires which are left unrepaired after such storms may still be very dangerous. Thus, where a wire is left suspended near the public highway where a person would likely come in contact with it on a dark night;¹⁴ or even where it is left so as to interfere with travel at any time, it would then become a nuisance for which the company would be liable for any injury arising therefrom. Of course, the company must have a reasonable time, after a displacement of wires caused by storms, to reach and repair the dangerous parts. What is a reasonable time depends somewhat upon surrounding circumstances. We understand that these companies have instruments in their offices by which they may be enabled to make an approximate calculation of the place at which the line is broken; at any rate if this cannot be determined, the operators surely can easily determine that the wire is either broken or out of line, by reason of the fact that messages cannot be sent over it; and as soon as the fact is ascertained, it is the duty of the company to restore the line immediately. If the line should not be broken or crossed, but only hanging loose from the insulators, messages could still be sent over the line without any hindrance and without the operators knowing anything about their being down. Under such circumstances, the company may not know of the danger in such wires, but as soon as it obtains the knowledge of the defect in the line, it is the duty of the company to restore it within a reasonable time.

§ 189. Same continued—crossing highways and railroads.

It is the duty of these companies to construct their lines sufficiently high when crossing streets, highways and railroad tracks as not to interfere with travel or the working of the employees of railroad companies. In towns and cities it often happens that vehicles travel the streets with loads reaching rather high from the pavement, and in order that any property or person should not be injured by the coming in contact of such vehicles with the lines of these companies crossing the streets, they should be constructed and kept reasonably high to avoid all such occurrences; on a failure to do so the company will be liable. The same duty is imposed upon such companies whose

¹⁴ *Ahern v. Oregon Tel., etc., Co.*, 41 Am. & Eng. Corp. Cas. 366.

Postal Tel. Cable Co. v. Zappi, 24 S. W. 688.

wires are crossing the country highways; but there may be some variances allowed with respect to the height of wires crossing country highways.¹⁵ It is very often the case that telegraph lines cross and recross railroad tracks; when they do, the wires should be stretched sufficiently high at these places as not to interfere with the running of trains, or to endanger the employees of the railroad companies.¹⁶

§ 190. Same continued—falling poles and other fixtures.

This subject might have been treated under some of the previously discussed subjects, but as it is not, we shall say something about it here. These companies must construct and maintain their poles so as not to endanger the public generally, or other public enterprises. In the first place, they must be located so as not to incommode the public unnecessarily;¹⁷ and if they have a license from a city to construct them on the streets, they will not be declared a nuisance. But if they clearly appear to be improperly located¹⁸ thereon, and injury results therefrom, the company will be liable notwithstanding the fact that it has a license from the city to construct the poles at such places;¹⁹ in this case, it would be jointly liable with the city.²⁰ The location may be properly made, but if its supporters are in such a manner as to cause injury, the company will still be liable. Thus, where the guy wire which supports the pole is swinging so low as not to permit a fire engine with its crew, which is rushing to the scene of a fire, to pass thereunder, the company will be liable, even though this wire is attached to a pole erected on neutral ground.²¹ Further, the poles should be sufficiently strong within themselves to

¹⁵ *Postal Tel. Cable Co. v. Jones*, 32 So. (Ala.) 500.

¹⁶ *American Tel., etc., Co. v. Kersh*, 27 Tex. Civ. App. 127.

¹⁷ *Sheffield v. Central U. Tel. Co.*, 36 Fed. 164.

¹⁸ *Wolfe v. Erie Tel., etc., Co.*, 33 Fed. 320; *Bonn v. Bell Tel. Co.*, 30 Ont. 696; *Nebraska Tel. Co. v. Jones*, 60 Neb. 396, 83 N. W. 197; *Kowalski v. Newark, Passenger R. Co.*, 15 N. J. L. 50; *West. U. Tel. Co. v. Eysir*, 2 Colo. 141.

¹⁹ *Keasby on Electric Wires*, p. 154; *Kowalsky v. Newark Pass. R. Co.*, 15 N. J. L. 50; *Wolfe v. Erie Tel., etc., Co.*, 33 Fed. 320.

²⁰ *Atkinson v. Cheatham*, 26 Ont. App. 521; *Geneva v. Brush Electric Co.*, 50 Hun (N. Y.) 581. See also *Nicholds v. Minneapolis*, 33 Minn. 430, 53 Am. Rep. 56, 23 N. W. 868.

²¹ *Wilson v. Great Southern Tel., etc., Co.*, 6 So. 781.

sustain the weight of the wires. For instance, a telephone company is not relieved from liability for injuries to a person owing to the falling of one of its poles of insufficient strength by the fact that the cutting of guy wires attached to a building by the owner thereof, after he had revoked his license, contributed to the falling of the pole.²² And they will continue to be responsible for injuries arising from an improper maintenance, although the system is to be maintained by another; as where the crossarms were maintained on a company's poles by another, it is nevertheless liable for injuries occasioned by the falling of an insulator therefrom, since the injury from such a cause might reasonably be contemplated.²³

§ 191. Obstruction to navigation by cable.

A telegraph company, whose cables are laid in the soft mud or soil and the bottom of a navigable river, in such a manner as to interfere with vessels which are accustomed to plow through the mud in their movements about the docks, thereby obstructing navigation contrary to the acts of Congress²⁴ which authorize any telegraph company to lay telegraph lines over, under or across the navigable streams and waters of the United States provided they are "so constructed and maintained as not to obstruct the navigation of such streams or waters;" is answerable for damages thereby to said vessels.²⁵

§ 192. Negligence—the basis of such actions.

It will be seen from the foregoing discussions on the subject of the liability of telegraph and telephone companies for injuries caused by improper location and maintenance of their lines, that negligence on the part of the company is the basis of such actions; and there can be no recovery in the absence of proof of it.²⁶ The company will not

²² *Johnson v. Northwestern Tel. Exch. Co.*, 51 N. W. 225.

²³ *Quill v. Empire State Tel. Co.*, 13 Misc. (N. Y.) 435.

²⁴ Rev. St. U. S. § 5263.

²⁵ *West. U. Tel. Co. v. Irrman, etc.*, Co., 43 Fed. 85.

²⁶ *Cumberland Tel., etc., Co. v. Coats*, 100 Ill. App. 519; *Allen v. At-*

lantic, etc., Tel. Co., 21 Hun (N. Y.)

22; *Monahan v. Miami Tel. Co.*, 9 Ohio Dic. 532, 7 Ohio N. P. 95; *Barnett v. Independent Tel. Co.*, 65 S. W. 1128; *Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143; see also *Lee v. Maryland Tel. etc., Co.*, 55 Atl. 680.

be liable when the proximate cause of the injury is some agency other than its own negligence; as where the proximate cause of the breaking of a telegraph pole was the collision therewith by a runaway team of horses, in which case it was held that the telegraph company was not liable for the damages caused by the fall of the pole which was so placed as to render collision with it impossible.²⁷ While there must be negligence in order that the company may be held liable, and proof of that fact, yet the negligence may be presumed;²⁸ as, in some cases, the facts, when undisputed, may be so strong as that the company will be guilty of negligence per se.²⁹ When this is the case, it is a question of law to be decided by the court;³⁰ but if the facts are disputed, the negligence then becomes a mixed question of law and fact.³¹

§ 193. Negligence—what constitutes.

In discussing the question of negligence, it might be well to consider what is meant by the term "negligence," or what is necessary to constitute negligence. It was said by an eminent jurist in discussing the question of actionable negligence, or negligence which constitutes a good cause of action: "There are necessarily three elements essential to its existence: the existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; a failure by the defendant to perform that duty; and an injury to the plaintiff from such failure of the defendant."³² In the

²⁷ *Allen v. Atlantic, etc., Tel. Co.*, 21 Hun (N. Y.) 22. See, also, *Henning v. West. U. Tel. Co.*, 43 Fed. 131; *Davis v. Dudley*, 4 Allen (Mass.) 557.

²⁸ *West. U. Tel. Co. v. State*, 82 Maryland 293, 83 Atl. 763, 31 L. R. A. 572n, 51 Am. St. Rep. 464; *Note to Hart v. Washington Park Club*, 48 Am. St. Rep. 305. See extended note to *Long v. Penn. R. Co.*, 30 Am. St. Rep. 136; see, also, *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 41 Am. St. Rep. 786, 26 L. R. A. 810, 19 S. E. 344.

²⁹ *Southern Bell Tel., etc., Co. v. McTyer*, 137 Ala. 601, 34 So. 1020, 97 Am. St. Rep. 62.

³⁰ *Roberts v. Wisconsin Tel. Co.*, 77 Wis. 589, 20 Am. St. Rep. 143, 46 N. W. 800.

³¹ *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810, 16 L. R. A. 545.

³² *Faris v. Hoberg*, 134 Ind. 269, 30 Am. Rep. 261; 33 N. E. 1028; *Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376; *Gunn v. Ohio, etc., R. Co.*, 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 812; *Montgomery v. Muskegon Booming Co.*, 88 Mich. 635, 50 N. W. 729, 26 Am. St. Rep. 308; *Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746.

first place, it is the duty of these companies to so construct and maintain their lines as not to endanger the public. This is a duty imposed on all enterprises which undertake to carry on a public business; and the courts will, therefore, take judicial notice that it is the duty of telegraph and telephone companies to exercise care to prevent their lines from interfering with or endangering public travel.³³ If it were not a duty of these companies to maintain their lines so as not to endanger the public, they could not be guilty of negligence in this respect; for this, as said above, is one of the necessary elements of negligence. There may be instances cited where an injury has been inflicted by some cause for which these companies would not be liable, in that they were not under any obligations to protect the injured party from such injury; or that it was not their duty to use ordinary care to prevent the proximate cause; but it is unquestionably their duty to construct and maintain their lines in such a manner as not to endanger the public. Corporations are just as liable to violate the laws or commit wrongs as individuals, and if there were no means by which they could be punished for such violation, or no remedy to right the wrong, the reader can easily see what the results would be. In other words, if these companies were allowed to carry on their business in a *harum-scarum*, slipshod manner, the public would be continuously thrown in hazardous places without any protection from these companies. Therefore, for public policy these companies are enforced to exercise due care to construct and maintain their lines in such manner as not to interfere with or endanger the public.

§ 194. Same continued—failure to perform duty.

In order for the injured party to recover, it must be further shown that the company has failed to perform the duty of constructing and maintaining its lines in a proper manner; and among the three elements necessary to constitute the existence of negligence, this is the most essential one to be proven. As said in the preceding paragraph, the courts will take judicial notice of the duties of these companies toward the public with respect to the construction and maintenance of their lines but it must be shown by some kind of testimony that the

³³ *Postal Tel. Cable Co. v. Jones*, 32 So. 500.

failure on their part to perform such duties was the cause of the injury. The proof of such failure may be a mixed question of law and fact,³⁴ but if the proof of such failure is undisputed and it is sufficiently clear that the duty has not been performed, the court should settle the case as a question of law; or, the testimony may be disputed and still it would be a question of law to be settled by the court. For instance, if a wire is left swinging across the streets for several days, to the knowledge of the company which has had reasonable time to remove it but fails to do so, whereby injury is sustained, the court should say whether the company has failed to perform its duty; and yet this might be a question for the jury, where there is doubt as to whether the company has had a reasonable time to remedy the defect in the line.³⁵ In some cases, it may be presumed that the company has failed to perform its duty in maintaining its lines,³⁶ and this presumption may arise from an accident. Thus, if the circumstances are of such a nature that it may fairly be inferred upon the most reasonable probability that the accident was caused by the failure of the company to exercise proper precaution, a presumption of negligence arises.³⁷ And, further, the facts may go to show that the manner in which the company's lines are maintained, were such within themselves, as to give the court the power to decide the case; or, in other words, the company may be guilty of negligence per se for the manner in which it constructs and maintains its lines.³⁸ While in some cases the question as to whether or not the company has failed to perform its duty in properly constructing and maintaining its lines may be so clear and convincing as that the court should decide

³⁴ *Southwestern Tel. Co. v. Robinson*, 50 Fed. 310, 16 L. R. A. 588.

³⁵ *Postal Tel. Cable Co. v. Jones*, 32 So. 500.

³⁶ *West. U. Tel. Co. v. State*, 82 Md. 293, 83 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 512n; *Haynes v. Raleigh Gas Co.*, 114 N. E. 203, 23 L. R. A. 810, 41 Am. St. Rep. 786; *Girandi v. Electric Imp. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 108, 28 L. R. A. 596.

³⁷ *Hart v. Washington Park Club Co.*, 157 Ill. 9, 41 N. E. 620, 29 L. R. A.

492, 48 Am. St. Rep. 298; *Howser v. Cumberland, etc., R. Co.*, 80 Md. 146, 45 Am. St. Rep. 332, 27 L. R. A. 154, 30 Atl. 906. See extended notes to *Philadelphia, etc., R. Co., v. Anderson*, 20 Am. St. Rep. 490; *Hunn v. Gohlenbuck*, 6 Am. St. Rep. 794; *Fleming v. Pittsburg, etc., R. Co.*, 38 Am. St. Rep. 837, and *Long v. Pennsylvania R. Co.*, 736.

³⁸ *Southern Bell, etc., Tel. Co., v. McTyer*, 137 Ala. 601, 34 So. 1020, 97 Am. St. Rep. 62.

it as a question of law, yet in a majority of cases the question should be left to the determination of a jury, as there are almost always some controverted facts with respect to the failure of the company to perform its duty. In some instances, as will hereafter be discussed, it may be attempted to be shown that the party sustained his injury by his own contributory negligence. When this is the case the question can only be settled by a jury after having been properly charged as to the law in the case.

§ 195. Same continued—an injury sustained.

The company may fail to perform the duty of maintaining its lines, which it is under obligation to the public to perform, but still, if there is no injury sustained by any one for such failure, the company will not be liable. It may commit a wrong or violate its public duties, for which the public may have recourse, but if no one has sustained an injury, or if his injuries are no greater than those suffered by the public in general, the company can only be liable for a public prosecution. It is not enough that the party should have been injured, but the injury must be the result of the failure on the part of the company to perform its duty, and this failure must be the proximate cause of the injury and not some agency put in force by the negligence of another.³⁹ The failure of the company to perform its duty in maintaining its lines may be actionable or not actionable. That is, it may proximately inflict an injury, or it may result harmlessly, or be but the remote cause or mere condition of an injury, of which some intervening act or negligence is the efficient and proximate cause. It follows, therefore, that there must not only be a casual connection between the said failure of the company to maintain its lines properly, or the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence—without intervening efficient causes—so that but for the negligence of the company the injury would not have occurred. It must not only be a cause but it must be the proximate cause; that is, the direct and immediate cause of the injury.⁴⁰ Thus, it would not

³⁹ *Allen v. Atlantic, etc., Tel. Co.*, 21 Hun (N. Y.) 22. See, also, *Hemming v. West. U. Tel. Co.*, 43 Fed. 131; *Davis v. Dudley*, 4 Allen (Mass.) 557.

⁴⁰ *Shearman and Redfield Neg.*, § 26:

Oil Creek, etc., R. Co. v. Keighorn, 74 Pa. St. 320; *Louisiana Mt. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 52; *Rockford v. Tripp*, 83 Ill. 247, 25 Am. Rep. 381;

be liable for an injury, one of the concurrent causes of which was the presence of its wires, as where the poles and wires interfered with the operations of a fire company and prevented the extinguishment of the fire;⁴¹ nor would it be liable for an injury caused by a broken pole or line, when the defect in the line has been caused by a severe storm;⁴² but if the defective part is allowed to remain unrepaired unreasonably long, and a new force intervened, with the creation of which the company was not responsible and which would have been harmless but for the defective line, the company will be liable on the ground that the proximate cause was—not altogether the defect in the line—the negligence in repairing the line within a reasonable time after the breakage.⁴³

§ 196. Evidence of negligence.

In the absence of any presumption of the company's negligence, the injured party must prove, by a fair preponderance of the evidence, facts which establish the negligence of the company as being the proximate cause of his injury;⁴⁴ and having done this, he is en-

Patah v. Covington, 17 B. Mon. (Ky.) 722, 66 Am. Dec. 186; *Tentin v. Hurley*, 98 Mass. 211, 93 Am. Dec. 154; *Worcester v. Great Falls Mfg. Co.*, 41 Me. 159, 66 Am. Dec. 217; *Fairbanks v. Kerr*, 70 Pa. St. 86, 10 Am. Rep. 664; *Louisville, etc., R. Co. v. Gatheric*, 10 Lea. (Tenn.) 432; *Donnell v. Jones*, 17 Ala. 689, 52 Am. Dec. 194; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. St. Rep. 609; *Lord Bailiffs, etc., v. Trinity House*, 39 L. J. Exch. 163.

⁴¹ *Chaffe v. Tel., etc., Const. Co.*, 77 Mich. 625, 43 N. W. 1064, 18 Am. St. Rep. 424; *Nicholds v. Minneapolis*, 33 Minn. 430, 53 Am. Rep. 56, 23 N. W. 868.

⁴² *Ward v. Atlantic, etc., Pac. Tel. Co.*, 71 N. Y. 81, 27 Am. Rep. 10.

⁴³ *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. 810; *Southwestern Tel. etc., Co. v. McTyer*, 137 Ala. 601, 34 So. 1020, 97 Am. St. Rep. 62.

⁴⁴ *Saybolt v. New York, etc., R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Croudall v. Goodrich Transpt. Co.*, 16 Fed. 75; *Allen v. Willard*, 57 Pa. St. 374; *McCaig v. Erie R. Co.*, 8 Hun. (N. Y.) 599; *Searles v. Manhattan R. Co.*, 101 N. Y. 661; *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *New Jersey Steamboat Co.*, 47 N. Y. 291; *Edgerton v. N. Y., etc., R. Co.*, 39 N. Y. 227; *Tooney v. Brighton, etc., R. Co.*, 3 C. B. N. S. 146; *West. U. Tel. Co. v. Thorn*, 64 Fed. 287; *Southern Bell Tel., etc., Co. v. Lynch (Ga.)* 20 S. E. 500. The testimony for the plaintiff tended to show that she and her daughter left their house about half-past 9 o'clock at night, and as they started across the street they stumbled over a wire, one end of which was lying loosely, somewhat coiled up on the ground, and the other attached to a pole of the defendant; that

titled to recover except in those jurisdictions which hold that he must also take the burden of negating contributory negligence on his own part.⁴⁵ Where the burden is on the injured party to prove negligence on the part of the company, it generally becomes a question to be decided by the jury; as, where there was evidence that the company's wires had been detached from a pole so as to obstruct a highway for two days prior to an injury occasioned thereby, it was a question for the jury whether or not the company had exercised due care in discovering and remedying the condition of the wires.⁴⁶ Evidence to the effect that the wire became detached because of being fastened to a rotten arm, was sufficient to warrant a finding that the

it was dark and raining; that both of them were tripped and thrown to the ground; that plaintiff was assisted by her daughter to rise, and continued across the street, bought goods, and returned to the house, reaching there about twenty minutes after she started out; and that the loose end of the wire had been down for two or three weeks, most of which time it was tied to a tree, 12 to 15 inches above the ground. The testimony for the defendant tended to show that it employed six men, whose duties were constantly to traverse the city and inspect and repair, when necessary, the company's wires, there being about 3,000 miles of them in Atlanta. The company's manager testified that they called up every subscriber in the city every ten days, to learn whether or not the wire was out of order or the instrument broken, and, if they got no response, they sent a man to find out what was the matter; that the men thus employed are experts, and readily notice any trouble on the line in the street; and that the wires sometimes are broken by heavy rains, storms, cold weather, etc. It also appeared that none of the company's employees had any notice that there was a wire down at the place in question, until the morn-

ing succeeding the night when plaintiff claimed to have been hurt; that one of them testified that he went to the store of one of plaintiff's witnesses on the day of the alleged injury, and fixed a telephone there, and that he looked at the wires just below that place, and saw none down; that this store was next to plaintiff's residence. Other employees of the company were in the same vicinity two days before, and the wires were in good order, so far as they saw, though the wire might have been down without their seeing it. The testimony for the company further tended to show that the plaintiff was not injured nearly so seriously as she claimed, and it was held that the evidence warranted a verdict for plaintiff.

⁴⁵ *Cincinnati, etc., R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *State v. Maine Cen. R. Co.*, 76 Me. 357, 49 Am. Rep. 622; *Vicksburg v. Hennessy*, 54 Miss. 391; *Moore v. Shreveport*, 3 La. Ann. 645; *Burton v. Frink*, 51 Conn. 342; *Greenleaf v. I. C. R. Co.*, 29 Iowa 14, 4 Am. Rep. 181; *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425.

⁴⁶ *Postal Tel. Cable Co. v. Jones*, 32 So. 500.

use of the cross-arm was negligence, proximately causing plaintiff's injury.⁴⁷ But the question of admissibility of evidence should be left to the court to decide on precedent rulings; as, where an action for damages for injuries sustained by being thrown over a telephone wire, it is a question for the court as to whether evidence should be admitted to show that shortly after the accident the defendant raised its wires at that point. It has been held that such evidence was admissible.⁴⁸ Evidence has been admitted to show the height of the wires on a prior day;⁴⁹ this is not, however, the general doctrine.⁵⁰ Upon an issue as to the soundness of certain poles which had fallen, it is error to admit evidence of the soundness of other poles near them, without showing some proof that their condition ought to be the same as that of the others.⁵¹ Evidence that after the occurrence of the injury the company repaired the place where the injury occurred, or discharged a negligent servant, is inadmissible; since to admit such would be to place a premium upon the continuance of negligence.⁵² And evidence which tends to prove that other parties had passed safely along the place of the accident, should not be admitted, as this is not proof of the exercise of proper care by the company.⁵³ But evidence may be admitted to show that others received injuries

⁴⁷ *Clairane v. West. U. Tel. Co.*, 40 La. Ann. 178, 3 So. 625.

⁴⁸ *Penn. Tel. Co. v. Varnau et al.*, 15 Atl. 624.

⁴⁹ *Id.*

⁵⁰ *Nalley v. Hartford, etc., Co.*, 51 Conn. 524, 50 Am. Rep. 47; *Delaney v. Hilton*, 50 N. Y. Supt. 341, 44 Am. Rep. 649; *Hinkel v. Murr* 31 Hun. (N. Y.) 28; *Martin v. Towe*, 59 N. H. 31; *Tyler v. Todd*, 36 Conn. 220; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Wooley v. Grand St., etc., R. Co.*, 83 N. Y. 121; *Sewell v. Cohoes*, 75 N. Y. 45, 31 Am. Rep. 418; *Hudson v. Chicago, etc. R. Co.*, 59 Iowa 581, 44 Am. Rep. 692; *Cronur v. Burlington*, 45 Iowa 627, 13 N. W. 735; *Morrell v. Pack*, 24 Hun (N. Y.) 37; *Terre Haute,*

etc., R. Co. v. Clem, 123 Ind. 15, 23 N. E. 965; *Ely v. St. Louis, etc., R. Co.* 77 Mo. 34; *Dale v. Delaware, etc., R. Co.*, 73 N. Y. 471; *Morse v. Minneapolis, etc., R. Co.*, 30 Minn. 465, 16 N. W. 358; *Baird v. Dailey*, 68 N. Y. 551, 15 Am. Rep. 488.

⁵¹ *West. U. Tel. Co. v. Levi*, 47 Ind. 552.

⁵² *Readman v. Conway*, 126 Mass. 374; *Sewell v. Cohoes*, 11 Hun (N. Y.) 626; *Couch v. Watson Coal Co.*, 46 Iowa 17; *Campbell v. Chicago, etc., R. Co.*, 45 Iowa 76.

⁵³ *Branch v. Libbey*, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 310; *Hudson v. Chicago, etc. R. Co.*, 59 Iowa 581, 44 Am. Rep. 692; *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520.

at the same place and in the same manner;⁵⁴ yet this has been otherwise held by some of the courts.⁵⁵ In determining relevancy or admissibility of evidence, the court should always forbid the admission of testimony to a collateral fact which furnishes no legal presumption as to the principle fact in dispute.⁵⁶ To state the numberless decisions on the relevancy or admissibility of certain evidence in negligence cases, would be an almost impossible task, but the general rule governing the admission of evidence in civil cases applies as well to the subject under consideration as elsewhere.⁵⁷ Therefore, it will hardly be advisable to enter into a discussion of any length on this subject, but refer the reader to treatises on this particular subject.

§ 197. Contributory negligence.

If the plaintiff, or party injured, by the exercise of ordinary care, under the circumstances, might have avoided the consequence of the company's negligence, but did not, the case is one of mutual fault and the law will neither cast all the consequence upon the company nor will it attempt any apportionment thereof.⁵⁸ The injured party must not have contributed to the negligence of the company, wherein he was caused to be injured, yet it must be clearly shown that he was guilty of contributory negligence, otherwise it will not be a good defense. For instance, the mere fact that the plaintiff, while walking the street in the daytime, failed to observe an electric light wire suspended a few inches above the ground, over which he fell, does not of itself constitute contributory negligence;⁵⁹ or when it was shown that other persons, with wagons loaded equally high, had passed under the same wire without injury, this does not show contributory negligence.⁶⁰ Where the plaintiff has violated a city ordinance and in

⁵⁴ *Wooley v. Grand St., etc., R. Co.*, 83 N. Y. 121; *Phelps v. Winona, etc., R. Co.*, 37 Minn. 485, 35 N. W. 273.

⁵⁵ *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *Piollet v. Simmurs*, 106 Pa. St. 95, 51 Am. Rep. 496; *Aldrich v. Inhabitants of Pelham*, 1 Gray (Mass.) 510; *Johnson v. Manhattan R. Co.*, 52 Hun (N. Y.) 111.

⁵⁶ 1 Whart. on Ev. §§ 29, 40; *Collins v. Dorchester*, 6 Cush. (Mass.) 397; *Aldrich v. Inhabitants of Pelham*, 1 Gray (Mass.) 510.

⁵⁷ 1 Wharton on Ev. §§ 40-44; 1 Greenleaf on Ev., § 49, note, c. p. 72, of 14th Ed.

⁵⁸ *Cooley on Torts*, 674.

⁵⁹ *Brush Electric Light Co. v. Kelley*, 126 Ind. 220, 25 N. E. 812, 10 L. R. A. 250n. See, also, *Woods v. Boston*, 121 Mass. 337, for an illustration of the rule.

⁶⁰ *Pennsylvania Tel. Co. v. Varnau*, 15 Atl. 624.

doing so is injured by a telephone company, it is not per se contributory negligence on the part of the injured party.⁶¹ In all cases where the defense of contributory negligence is set up by the company, it will be a question of fact to be settled by a jury.⁶²

§ 198. Injuries to servants—under common law.

The question as to whether or not employees can recover damages from telegraph and telephone companies for injuries sustained while discharging their duties thereunder, is settled by the rule applicable to master and servant.⁶³ Where this rule has not been changed by the constitution, it is well settled that a servant assumes the obvious risks of the service into which he enters, even if the business be ever so dangerous, and if it might easily be conducted more safely by the employer. This is implied in his voluntary undertaking, and it comes within a principle which has a much broader and more general application, and which is expressed in the maxim, *Volenti non fit injuria*. The reason on which it is founded is, that whatever may be the master's general duty to conduct his business safely in reference to persons who may be affected by it, he owes no legal duty in that respect to one who contracts to work in the business as it is.⁶⁴ Thus, where an experienced lineman brought suit to recover damages for an injury sustained by the giving away of an unsound pole, it was held that telephone companies have a right to decide how their work

⁶¹ *Havey v. Mich. Tel. Co.*, 124 Mich. 607, 83 N. W. 600.

⁶² *Kyes v. Valley Tel. Co.*, 93 N. W. 623.

⁶³ *West. U. Tel. Co. v. Tracey*, (52 C. C. A. 168), 114 Fed. 282; *Bergin v. Southern New Eng. Tel. Co.*, 70 Conn. 54, 38 Atl. 888; *McCarty v. Southern New Eng. Tel. Co.*, 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62; *Jenney Electric Light, etc., Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; *Clairain v. West. U. Tel. Co.*, 40 La. Ann. 178, 3 So. 625; *Maryland Tel., etc., Co. v. Cloman*, 55 Atl. 681; *Flood v. West. U. Tel. Co.*, 15 N. Y. Supp. 400; *Chalmers v. Patterson, etc., Tel. Co.*,

66 N. J. L. 41, 48 Atl. 993; *Postal Tel. Cable Co. v. Coote*, 57 S. W. 912; *General Electric Co. v. Murray*, 74 S. W. 50.

⁶⁴ *Fitzgerald v. Connecticut Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537; *Rolseth v. Smith*, 38 Minn. 14, 35 N. W. 565, 8 Am. St. Rep. 637. Compare *Taylor, etc., R. Co. v. Taylor*, 79 Tex. 104, 23 Am. St. Rep. 316; *Seanton v. Boston, etc., R. Co.*, 147 Mass. 484, 18 N. E. 209, 9 Am. St. Rep. 733. A servant takes the risk of known dangers, not of others; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631.

should be performed, and may employ men to work in an unsafe place, or with dangerous implements, without incurring liability for injuries sustained by workmen who know, or should have known, of the hazards of the service they have chosen to enter.⁶⁵ And, where it is a rule that a lineman should look out for his own safety in climbing poles, and should inspect and test poles for himself and judge of their safety, suitable appliances being at hand for such testing, an experienced lineman must be presumed to have known of this custom; and if he climbs a pole when ordered, without such test, and is injured through its rotten condition, the accident must be regarded as due to his own fault or negligence.⁶⁶ When an employee was injured in consequence of his using a defective ladder, and it appeared that he had continued using the ladder after knowing of the defect, a recovery was denied.⁶⁷

§ 199. Same continued—changed by statute.

The statutes and constitutions of some states have changed the foregoing rule, so that the employees of telegraph and telephone companies have the same rights and remedies for injuries suffered by the former from the acts or omissions of such companies or their employees, as are allowed by law to other persons not employees; and knowledge of the defective or unsafe character or condition of any machinery, way or appliances, shall not be a defense to any action for injury caused thereby.⁶⁸ But where the constitution provides that the employees of a certain class of corporations shall have these rights and remedies, statutes thereunder cannot enlarge⁶⁹ the meaning of this constitutional clause so as to embrace employees of other corporations not expressly mentioned therein.⁷⁰ It seems to us that the lawmakers of our country should provide some means whereby

⁶⁵ *McCarty v. Southern, etc., Tel. Co.*, 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62; *McIsaac v. Northampton, etc., Co.*, 172 Mass. 89, 70 Am. St. Rep. 244, 51 N. E. 524.

⁶⁶ *McCarty v. Southern, etc., Tel. Co.*, 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62; *McIsaac v. Northampton, etc., Co.*, 172 Mass. 89, 51 N. E. 524, 70 Am.

St. Rep. 244; *Jenney Electric Light, etc., Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30.

⁶⁷ *Jenney Electric Light, etc., Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30.

⁶⁸ Const. (Miss.) 193.

⁶⁹ Laws (Miss.) 98, p. 85, C. 66.

⁷⁰ *Ballard v. Mississippi Cotton Oil Co.*, 34 So. 533.

the honest, faithful and hardworking laborer would be protected for injuries sustained while in the discharge of his duties. He is generally of a class of people to whom work becomes a matter of necessity and without which the wants, cares and comforts of a home would be fearful to behold and touching to the inner feeling of the observer. On the other hand, these companies must have their business carried on, regardless of the risks and dangers necessarily to be undergone, and this must be done by their employees. If then, he is to make a test and examination of the strength, soundness and safeness of the poles, wires, cross-arms and other material and appliances, before he would be exonerated for any negligence on his part, and demanded that the requisite time be allowed him for that purpose, he would never have been employed.⁷¹ Therefore, as said before, it seems to us that there should be some remedy at the common law, whereby employees of these companies should be protected for injuries sustained while performing their duties at such hazard as they are almost forced to undergo.

§ 200. Must furnish suitable appliances and employees.

Notwithstanding the fact, that, by the common-law rule, the employees of telegraph and telephone companies assume all risks and dangers to which they may be subjected while in the discharge of their duties, yet these companies must furnish them with such appliances for their work as are suitable and such as may be used with safety.⁷² This, by implication of law, is a stipulation in every contract for service; and if the employee is injured by reason of defective appliances placed in his hands by the company, it is liable unless it can show that it has used due care in the selection or manufacture of the same.⁷³ Thus, where plaintiff's intestate, while em-

⁷¹ *Clairain v. West. U. Tel. Co.*, 40 La. Ann. 178, 3 So. 625.

⁷² *Clairain v. West U. Tel. Co.*, 40 La. Ann. 178, 3 So. 625; *Portance v. Lehigh Valley Coal Co.*, 101 Wis. 574, 77 N. W. 875, 70 Am. St. Rep. 932; *Ell v. Northern Pac. R. Co.*, 1 North Dak. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97n; *Chameon v. Sanford Co.*, 70 Conn. 573, 40

Atl. 462, 41 L. R. A. 200, 66 Am. St. Rep. 133; *Numedy v. Chase*, 119 Cal. 637, 53 Pac. 33, 63 Am. St. Rep. 153; *Chicago, etc., R. Co. v. Maroney*, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396; *McMahon v. Ida Min. Co.*, 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478.

⁷³ *Warner v. R. Co.*, 39 N. Y. 468;

ployed in putting up telegraph wires for defendant company, fell from a telegraph pole and was killed, through failure of defendant to furnish the means and appliances required for the safe and efficient performance of such work, defendant was held liable in damages;⁷⁴ and where an employee was injured by a sudden turning on of the current, or by a "live" wire sagging upon a "dead" one, the company was held liable.⁷⁵ The company cannot be relieved from responsibility by the fact of its having had no knowledge of the defect in the machinery or appliances, unless it can clearly show that reasonable care was exercised in the selection or manufacture of the same.⁷⁶ It is the duty of these companies to furnish the most efficient appliances to, and exercise the same degree of care with the employees to prevent them from being injured, where the common law rule has been changed by statutes—whereby they have the same right and remedies for such injuries as other persons. The rule also applies to furnishing a sufficient number of skilled employees who can do their work carefully and properly.⁷⁷

§ 201. Injury to these companies.

While telegraph and telephone companies must use due care in the operation of their lines to protect the public from injury, the public, on the other hand, must not commit acts which would interfere with, in any manner, the former's business. In many states there have been statutes passed which subject any person to indictment who in-

Chicago R. Co. v. Sweet, 49 Ill. 202; Northcates v. Bochelder, 111 Mass. 322; Camp Point Mfg. Co. v. Ballow, 71 Ill. 418; Naves v. Smith, 28 Vt. 39.

⁷⁴ Clairain v. West. U. Tel. Co., 40 La. Ann. 178, 3 So. 625.

⁷⁵ Colorado Electric Co. v. Lubbers, 11 Colo. 505, 7 Am. St. Rep. 255; Warmell v. Maine, etc., R. Co., 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321. See note to Smith v. Peninsular Car Works, 1 Am. St. Rep. 548; Peidmont Electric Illuminating Co. v. Patterson, 84 Va. 747, 6 S. E. 4; Krautz v. Brush Electric Light Co., 82 Mich. 457, 47 N. W. 787; Weiden v. Brush Electric

Light Co., 73 Mich. 268, 41 N. W. 269.

⁷⁶Hayden v. Smithfield Mfg. Co., 29 Conn. 548; Naves v. Smith, 28 Vt. 59; Ryan v. Fowler, 24 N. Y. 410; Cayzer v. Taylor, 10 Gray (Mass.) 274; Seaver v. Boston, etc., R. Co., 14 Gray (Mass.) 466; Wonder v. Baltimore, etc., R. Co., 32 Mo. 411; Buzzell v. Laconia Mfg. Co., 48 Me 113; Flike v. Boston, etc., R. Co., 53 N. Y. 549; Mad River, etc., R. Co. v. Barber, 5 Ohio St. 541.

⁷⁷Moss v. Pac. R. Co., 49 Mo. 167; Skipp v. The E. C. R. Co., 9 Exch. 225.

tionally or negligently in anywise obstructs, injures, breaks, or destroys, or who in any manner interrupts the communications made between any two points on the lines, or who shall carry away, injure or destroy any of the posts, wires, insulators, or fixtures, or things belonging to such companies.⁷⁸ Independent of these statutes, any person or corporation willfully interfering with or destroying such lines, may be held liable for trespass.⁷⁹

§ 202. Interference by other electrical appliances—in general.

The operation of these companies may be interfered with by other electrical appliances, such as electric railway and electric light companies, when they are all on the same streets and their lines are running parallel. There has been considerable litigation arising on the subject, where one attempts to enjoin the other from using the streets in such a manner as to interfere with the working of the machinery of the light company. The operation of these companies is somewhat similar and in order to fully understand the working of each, so that the reader may see where the business of one may be seriously interfered with by that of another, and whereby the same may be remedied or prevented, it might be well to discuss the manner in which these companies are operated. While the business of an electric light company is not one and the same as that of an electric railway company, yet the means of producing the lights—by an electric current passing over the line wire from the motor and returning thereto by another wire—is manipulated in almost the same manner as that by which electric cars are propelled. To have a clear understanding of the manner in which the latter is operated will be sufficient to explain how telephone and telegraph companies may be interfered with, by either or both of these companies, and how the same may be protected.

⁷⁸ *Davis v. Pacific Tel., etc., Co.*, 127 Cal. 312, 59 Pac. 698, construing Pen. Code Cal. § 591; Code Miss. 1892, § 1300; Shannon's Anno. Code Tenn. 1896, § 1839; *Southwestern Tel., etc., Co. v. Priest*, 72 S. W. 241, construing Pen. Code Tex. art. 784; *West. U. Tel. Co. v. Bullard*, 65 Vt. 634, construing Stat. Vt. 1894, § 4249.

⁷⁹ *Sub-Marine Tel. Co. v. Dickson*, 15 C. B. N. S. 759, 109 E. C. L. 759; *The Clara Killane*, L. R. 3 A. & E. 161, 19 W. R. 25, 39 L. J. Adm. 50; *Farnsworth v. West. U. Tel. Co.*, 6 N. Y. Supp. 735; *American U. Tel. Co. v. Harrison*, 31 N. J. Eq. 627.

§ 203. Same continued—how operated—interference.

Telephone and telegraph companies have wires running out from some central office or offices, to their subscribers and other sub-offices, where the same are connected to a receiver. There is another wire at the receiver which connects this with the ground wire or the earth, whichever it may be. This ground wire, when one is used, is connected with the central office, thereby making a complete circuit. These ground wires are not used extensively except in cities, but the earth is used instead. In either instance, there is a complete circuit made and the messages are transmitted over these wires, partly, by means of electricity. There are, so far, two methods by which electric railway cars are operated, with respect to this circuit: First, the electricity, which is produced at the powerhouse, is conducted around the line on wires supported by some means immediately over the center of the track. It is then conducted from the wire to the motor on the car by means of a bar or trolley connecting the latter with the wire. It then escapes through the wheels to the track, and thence over the track back to the powerhouse, thereby making an entire circuit. This method is called the single-trolley system. The other way is the same as this, with this exception, viz: instead of the track and the ground being used for the return circuit, there is another wire placed underneath the surface, for the purpose of connecting the circuit. This is the double-trolley system. The first of these is considered by experienced electricians to be the most simple, convenient and cheaper of the two; and for these reasons it is the system most generally used. It will be seen that there is a complete circuit made by all of these companies, having the central office or the powerhouse as the beginning of the circuit, and at which point the current of electricity is transmitted to the circuit; and, it is the current of the circuit of each of these companies which may be interfered with.

§ 204. Same continued—causes of disturbances.

The telephone, in order to be successfully operated, requires a delicate, sensitive electric current with accurate pulsations, and whenever this current is strengthened, or its pulsations interfered with by the addition of electric force from extrinsic sources, its usefulness is

impaired or destroyed. The interfering currents cause a buzzing sound, which almost drowns the voice and makes the annunciators ring, thus materially interfering with the successful working of the apparatus at the central office. These companies, most generally, when there are not many interferences caused by other companies, use the ground as a return circuit.⁸⁰ At the end of the line or at the receiver, the wires are placed in the ground or they are attached to water or sewerage pipes, which conducts the escape current to the central office. This current may be interfered with on the wires and poles above the ground, by powerful currents conveyed over the wires employed by electric light and railway companies and is produced by "inductive" electricity, or it may be interfered with on the return circuit underneath the ground by "conduction" or "leakage." It shall be our pleasure to discuss, separately, the interferences which may be caused on either, and how the same may be remedied.

§ 205. "Inductive" electricity—meaning of—effect.

"Inductive" electricity is the attraction which the feed wires of these companies have for one another. The feed wires of electric light and railway companies are always heavily charged with electricity when the said companies are operating their plants; and when there is a telephone or telegraph wire stretched near to and parallel with the wires of these companies, there is a tendency of the more heavily charged feed wire of such companies to be attracted toward the wire of the telephone company. The induction may be great or small, and the greater the amount necessarily produces a greater inductive force. The amount of induction depends upon variation in current, the distance of the wires from each other, and the length of parallelism of the wires. The current upon the trolley wire and the feed wire of the railway is quite variable in quantity and intensity, owing to the drain upon the store of electricity by the moving and stopping of the car. Nor is the electricity, as generated, exactly uniform in its flow from the dynamo. The result is, whenever the telephone wire is parallel with the trolley wire and feed wire, there is induced into the telephone wire a current whose variation corresponds

⁸⁰ Cincinnati, etc., R. Co. v. City, etc., St. Rep. 559, 12 L. R. A. 534, 27 N. E. Tel. Assn., 48 Ohio St. 390, 29 Am. 890.

with the variation of the electrical current on the electric railway wires, thereby producing such disturbances as render the use of the telephone plant impracticable.

§ 206. Same continued—actions—causes thereof.

The actions which arise under these interferences or obstructions to the business of telephone companies by electric light and railway companies, is by a bill of injunction, or an action for damages. In order to successfully maintain a bill of injunction, there should be alleged therein the fact that the use of the telephone line is being interfered with, or the transmission of messages over the same has been and is being obstructed, or is being disturbed by the intense and varying electric current passing over the feed wire of these companies which is running near to and parallel with the line wire of the telephone company. It must be further shown, in order for the telephone company to recover damages or to sustain a bill of injunction, that the loss caused by the conflict of poles and wires is because of defendant's fault or want of care. The loss of induction, unlike that caused by conduction, occurs upon and within the streets and is a direct and immediate result of the occupation and use of the streets, by a telephone company, simultaneously with these other companies, and would be obviated or remedied by the withdrawal of either company from the streets. It cannot be said that the rights of one to use and occupy the streets are greater than those of the other, nor that one is subservient to the other, for they are both quasi-public corporations, created by the same person and exercising their rights and privileged by permission of the same city authority. They both serve important public functions, and are equal candidates for public favor. Their respective rights to occupy and use the streets are co-ordinate. It is further clear that no conflict can occur between these companies in the use of the streets, if each shall remain in its proper sphere and exercise its power with that careful and prudent regard for the rights of others which the law enjoins.⁸¹ It, therefore, follows that the electric railway or light companies must be guilty of negligence, or a want of care, before they will become liable. If they, for in-

⁸¹ *Cumberland Tel., etc., Co. v. United Electric Railway Co.*, 32 Fed. 273.

stance, have their feed wire suspended in a proper manner over a track, or on the opposite side of the street to that on which the telephone wire is strung, the company will not be liable. In other words, the telephone company must exercise due care toward these companies and if it obstructs the streets in anywise as to prevent these companies from carrying on their business uninterruptedly, it cannot maintain this suit.

§ 207. Same continued—decision on point.

The court, in one of the most able decisions ever rendered in sustaining an injunction suit against electric railway companies from using its feed wire—the same having been constructed immediately over its track—in such a manner as to interfere with the use of the streets, by a telephone company, has the following to say: “The loss caused by conflict of poles and wires is imputable to defendant’s fault or want of care. Having power to have avoided this conflict without injury to its plant, it was the defendant’s duty to do so. The conflict was the result of defendant’s unnecessary act. On the other hand, the loss by induction cannot be imputed to any fault or negligence of defendant. Its plant was, as regards this matter, properly constructed and operated. Defendant could not obviate induction without abandoning the streets where it occurred. Induction is such obstruction of the streets as plaintiff is forbidden to create. The objection that induction is not an obstruction of the streets ‘sticks in the bark.’ True, it did not arrest the construction and operation of defendant’s plant, but that results not for the reason that induction is not an obstruction, but because defendant was sufficiently powerful to disregard and override it. A child upon defendant’s track, in front of its moving car, is not in a strict sense an obstruction; but who will say that the fact does not seriously interfere with defendant’s free and unembarrassed use of the street? The constraint caused by liability for legal penalties, if the child is crushed, operates as a very substantial obstruction. Defendant must stop the car or incur serious liability. It is vain to say that induction is not an obstruction if defendant shall be held for the unavoidable damage caused by it. It is true, induction implies no physical contact of the two plants, but is a direct and immediate result of plaintiff’s use and occupation

of the streets. The presence of plaintiff's poles and wires upon the street causes induction and their removal would obviate it. The plaintiff cannot recover for the loss sustained from induction. It results from its unlawful obstruction of defendant's use of the streets."⁸²

§ 208. Same continued—decision on "conduction."

The same court draws a distinction between the liability of these electric railway companies for the interference of the use of the streets by telephone companies by "induction" and "conduction," and shows how they may be liable for "conduction." The court says: "Is defendant liable for loss sustained by plaintiff from the effect of conduction? The loss by conduction, unlike that caused by induction does not result from plaintiff's obstruction of defendant's use of the streets for an ordinary purpose. This interference would occur and cause precisely the same loss to plaintiff, and in precisely the same manner. If plaintiff had no poles or wires upon the street, loss by conduction does not result in the slightest degree from the presence of the plaintiff's poles and wires upon the streets, and would not be to any extent remedied by their removal. The contact between the two plants, caused by conduction and the consequent injury, does not occur upon or within the streets or through the medium of plaintiff's poles and wires located upon the streets, but upon plaintiff's private property and that of its subscribers, lying outside of the streets and within half a mile on either side. The fact of plaintiff's occupation and use of the streets, a controlling factor in determining defendant's inability, for loss by induction, is irrelevant in the consideration of the question of defendant's liability for loss by conduction. This question must be determined as if the plaintiff had no poles or wires upon the streets. The proviso in the statute of 1885, forbidding plaintiff by the use of the streets to obstruct their ordinary use, has no application to the question under consideration. That statute limits plaintiff's use of the streets, but it does not abridge its right to private property outside the street and wholly detached from their use. That statute confers upon plaintiff the use of the streets and limits that use. It does not confer upon plaintiff any rights of private property outside the streets, and does not undertake to abridge

⁸² Id.

any such rights. The proviso pertains wholly and exclusively to the use of the streets. The defendant's claim to the dominant use of the streets, if conceded, has no place in the consideration of this question involving the rights of the parties outside the streets."⁸³

§ 209. Same continued—priority of time—induction.

The right of relief by injunction depends in a measure upon the fact as to whether the telephone company has a prior right of occupancy to the space covered by its wires as against the railway and electric companies. In a case where a telephone company sued for an injunction to restrain the electric light company from occupying certain streets, and from placing its wires too close to its own, there was some contest as to which had the prior right of occupancy. The bill alleged that incandescent light wires could not be operated parallel to telephone wires at a less distance than three feet, nor are light wires at a less distance than two feet, without seriously interfering with the telephone, and that if the are light wires crossed the telephone wires at a less distance than ten feet without being securely boxed, there was danger of accident. The trial court enjoined the light company from using, for are light purposes, any wires running parallel and on the same side of the street with the telephone wires, and from using for incandescent light purposes any wires running parallel with the telephone wire on the same side of the street within a less distance than eight feet, and in any case for a distance greater than three hundred feet. It was further provided in the decree that, in all cases, wires must cross each other at an angle of not less than forty-five degrees, and a strong guard wire should be suspended between the wires of the two companies to prevent the upper wires from falling on the lower. The injunction was confined, however, to those streets in which the telephone company had a prior right of occupancy, and was refused as to streets in which the electric light company had been the first occupant. The court also enjoined the telephone company from placing its wires too near those of the light company. The decision of the trial court was sustained on appeal, except as to the injunction against the telephone company: that part of the injunction was set

⁸³ Id.

aside on the ground that the answer had asked for no affirmative relief, and that it did not appear that the telephone wires could exert the slightest influence upon those of the light company.⁸⁴

§ 210. Same continued—priority of time—conduction.

There is a different rule held by the courts with respect to the priority of time in the occupancy of streets where a telephone company attempts to enjoin other companies for injuries caused by "conduction" or "leakage." In a case on this point it appeared from the evidence that the use of the metallic circuit by either company would prevent any interference between the two currents. The telephone company could use such a circuit by the adoption of a safe and comparatively inexpensive device, while the railway company could do so only at a great expense and annoyance. The question was practically as to which company should undergo the expense of such a circuit. The denial of the injunction was placed by Brown, J., upon the following grounds: "First, that the defendants are making lawful use of the franchise conferred upon them by the state in a manner contemplated by the statute, and that such act cannot be considered as a nuisance in itself. Second: That in the exercise of such franchise, no negligence has been shown, and no wanton or unnecessary disregard of the rights of the complainant. Third: That the damages occasioned to the complainant are not the direct consequence of the construction of defendant's roads, but are incidental damages resulting from their operation, and are not recoverable."⁸⁵

⁸⁴ Nebraska Tel. Co. v. York Gas Light Co., 27 Neb 284, 43 N. W. 126; West. U. Tel. Co. v. Champion Electric Light Co., 14 Cin. Wkly. Bull. 327.

United Electric R. Co., 42 Fed. 273; Hoyt v. Jeffers, 30 Mich. 181; Hudson River Tel. Co. v. Watervliet Turnpike, etc. Co., 135 N. Y. 393, 17 L. R. A. 674; 31 Am. St. Rep. 838.

⁸⁵ Cumberland Tel., etc., Co. v.

CHAPTER XI.

REGULATION AND CONTROL.

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§ 211. Federal control.

Where telegraph and telephone companies extend into several states, they become instruments of interstate commerce, and messages sent over these lines are commerce between the states,¹ subject to the control of Congress, so far as regards matters connected with commerce among the states or with foreign countries.² Although the fact that a telephone company has extended its lines through differ-

¹ In re Pennsylvania Tel. Co., 48 N. State 348, 46 Am. St. Rep. 578, 24 L. J. Eq. 91, 20 Atl. 846, 27 Am. St. Rep. R. A. 724, 37 N. E. 710.
162; Central, etc. Tel. Co. v. Falley, ² Callum v. District of Columbia, 15 118 Ind. 194, 19 N. E. 604, 10 Am. St. App. Cas. (D. C.) 529.
Rep. 114; Dailey v. State, 51 Ohio

ent states, and is engaged in inter-state commerce, will not relieve it from the operation of state statutes upon business conducted wholly within the state; nor justify the refusal of such a company to furnish the best telephonic connections and facilities to persons doing business in such state, on the terms prescribed by such statute;³ nor will a state be prohibited from enacting laws subjecting such companies to penalties for acts of negligence occurring entirely within the limits of that state, although such acts may be committed in the delaying of the transmission of messages to points in other states.⁴ The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where practicable, against conflicting state legislation. Such conflicting legislation would inevitably follow with reference to telephonic communications between citizens of different states, if each state was vested with the power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as their transmission, would vary according to the judgment of each state. Thus, the Indiana statute requires telegrams to be delivered by messengers to persons to whom they are addressed, if they reside within one mile of the telegraph station, or within the city or town in which such station is; and the requirement applies according to the decision of the supreme court in this case when the delivery is to be made in another state. Other states might consider that the delivery by messengers to a person living in a city many miles in extent, was an unjust burden, and require the duty within less limits; so, if the law of one state could prescribe the order and manner of delivery in another state, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion would only follow the attempted exercise of such a power.⁵

§ 212. Same continued—concurrent state rights.

The power to regulate commerce is manifestly a dormant power until brought into activity. It covers a wide field and embraces many

³ Central, etc., Tel. Co. v. Falley, 118 Ind. 194, 10 Am. St. Rep. 114, 19 N. E. 604. 194, 22 S. E., 186, 51 Am. St. Rep. 68, 30 L. R. A. 158.

⁵ West. U. Tel. Co. v. Pendleton, 122

⁴ West. U. Tel. Co. v. Howell, 95 Ga. U. S. 347, 7 S. Ct. Rep. 1126.

subjects, and to the extent that Congress fails to exercise it in any given case, it seems to be conceded that it is a concurrent power and may be exercised by any state.⁶ Until this dormant power of the constitution is awakened and made effective by appropriate legislation, the reserved power of the state is plenary, and its exercise in good faith cannot be made the subject of review by the United States Supreme Court.⁷ Thus, the states may require foreign telegraph companies to have a known place of business within their jurisdiction, and an agent or agents thereat on whom summons may be served; or they may require a prompt delivery of messages received from another state and impose a penalty for a failure to do so;⁸ or they may provide a limited time within which suits must be brought and a notice of same given prior thereto.⁹ Because the company is a foreign corporation and carrying on interstate commerce, will not deprive the state of any of its police regulations.¹⁰

§ 213. Telegraph lines over subsidized railroads.

In order to have connection between the East and the West, Congress granted rights of ways to the Pacific railroads and aided and assisted them in the construction of their roads.¹¹ In connection with their railroad business, Congress also granted to them franchises for the construction and operation of telegraph lines along their roads. Congress, nevertheless, has control over these lines, and the railroads cannot evade the federal control of these lines by any agreement with a telegraph company,¹² as they may be compelled to so operate their lines as to give equal facilities to all, without any discrimination in favor of any person or corporation; and to receive

⁶ *Steamship Co. v. Joliffe*, 2 Wall. 450; *American U. Tel. Co. v. West. U. Tel. Co.* 42 Am. Rep. 90.

⁷ *Gilman v. Philadelphia*, 3 Wall. 713.

⁸ *Gray v. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301n.

⁹ *Burgess v. West. U. Tel. Co.*, 92 Tex. 125, 71 Am. St. Rep. 833.

¹⁰ *West. U. Tel. Co. v. Mississippi R. Co.*, 21 So. 15.

¹¹ *U. S. v. West. U. Tel. Co.*, 50 Fed. 28. See, also, *U. S. v. Union Pac. R. Co.*, 160 U. S. 1, 16 S. Ct. Rep. 190; *U. S. v. Northern Pac. R. Co.*, 120 Fed. 546.

¹² *U. S. v. Union Pac. R. Co.*, 160 U. S. 1, 16 S. Ct. Rep. 190. See, also, *U. S. v. Union Pac. R. Co.*, 163 U. S. 710, 16 S. Ct. Rep. 1206; *U. S. v. West. U. Tel. Co.*, 160 U. S. 53, 16 S. Ct. Rep. 210.

any exchange business with connecting lines.¹³ One of the requirements imposed upon these companies as to the franchise to operate a telegraph line along their roads, is that they cannot alienate the franchise; and it has been held that this right of control extends to any telegraph company exercising these franchises under an agreement with the railroad company.¹⁴

§ 214. State control.

Under its inherent power of police regulation over persons and property within its limits, the state may regulate the manner in which telegraph and telephone companies shall be constructed and maintained within its borders. The police power is one of the fundamental principles upon which the government was founded, and is absolutely essential to its general welfare. Upon this power rests the peace and tranquillity of all society, the enjoyment of health, the upbuilding of good morals, and the security and protection of property.¹⁵ No government can advance in civilization, in wealth, and in influence without an enforcement of these powers. When any corporation acquires a franchise for the purpose of carrying on a corporate business within a state, it is accepted subject to the police power. By giving the franchise, the state did not abrogate its power over the public highways; nor in any way curtail its power to be exercised for the general welfare of the people; nor do the states absolve themselves from their primary duties to maintain the highways of the respective states in a safe and proper condition for public travel and other necessary purposes.¹⁶ Neither can this power be alienated, surrendered, nor abridged by the legislature by any grant, contract, or delegation whatsoever; because it constitutes the exercise of a governmental function without which it would become powerless to do those things which it was especially designed to accomplish.¹⁷ It, therefore, follows that under its inherent power of police regulation, the state

¹³ U. S. v. Northern Pac. R. Co., 120 Fed. 546.

¹⁴ U. S. v. West. U. Tel. Co., 50 Fed. 28; U. S. v. Union Pac. R. Co., 160 U. S. 1, 16 S. Ct. Rep. 190; U. S. v. Northern Pac. R. Co., 120 Fed. 546.

¹⁵ Cooley on Const. Limitation, 572.

¹⁶ American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 13 L. R. A. 454n, 21 Am. St. Rep. 764; Sheldon v. West. U. Tel. Co., 121 N. Y. 697.

¹⁷ People v. Squire, 107 N. Y. 593, 1 Am. St. Rep. 893; Presbyterian Church v. New York City, 5 Cow. 540.

may regulate the manner in which domestic telegraph and telephone companies shall be constructed and carried on within its borders; and it may also regulate and control, to a certain extent, foreign corporations doing business within the state. While the telegraph and telephone companies may, and generally do, fall under the laws pertaining to interstate commerce, and therefore regulated by Congress, yet the states may prescribe certain conditions for them to perform before they will be protected and recognized under the state laws. For instance, a foreign telegraph company, which has failed to locate an office and place an agent thereat, on whom a summons may be served, in a state whose constitution provides that such must be done, will not be protected in an injunction suit instituted by such a company.¹⁸ They cannot be prevented from coming into a state—and they may, upon the principles of comity, do business therein, unless it is in conflict with the laws thereof or unjustly interferes with the rights of some of its citizens—yet they will not be protected by the state laws.¹⁹

§ 215. State may control the construction.

The state in granting to a telephone company a license to construct its line upon the streets or public highways does not relinquish its control over the streets and highways; nor does it divest itself of the right to exercise the police power in any way. But even if the state had granted some interest in the streets, it could nevertheless regulate the size and location of the poles, the height of the wires, and their location; and should they become an obstruction and a nuisance, the state could remove them or require them to be placed underground.²⁰ The company may be required to furnish a map showing the street or highway desired to be used and designate thereon the general course of the underground conduit to be used, with a description of its size and depth.²¹ The primary and fundamental object

¹⁸ *American U. Tel. Co. v. West. U. Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90.

¹⁹ *Id.*

²⁰ *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 13 L. R. A. 454n, 21 Am. St. Rep. 764; *Mut. U. Tel. Co. v.*

Chicago, 16 Fed. 309; *West. U. Tel. Co. v. N. Y.*, 38 Fed. 552; *Connell v. West. U. Tel. Co.*, 108 Mo. 459.

²¹ *People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893.

of all public highways is to furnish a passageway for travelers in vehicles, or on foot, through the country.²² They were originally designed for the use of the travelers alone, but in the course of time and in the interest of the general prosperity and comfort of the public, they have been put, especially in large cities, to numerous other uses, and yet such uses have always been held to be subordinate to the original design and use.²³ It is, therefore, the duty of the governmental power to secure a safe highway for the protection of life; and any control over the construction and maintenance of these companies which will enhance the interest of good morals and health, and protection to life, can and ought to be exercised under the police power. "The state may exercise any other general control in the construction of these companies as the public interest may require. The subjects upon which the state may act are almost infinite, yet in its regulations with respect to all of them, there is this necessary limitation: the state cannot thereby encroach upon the free exercise of the power vested in Congress by the constitution. Within that limitation it may undoubtedly make all necessary provisions with respect to the construction of poles and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require."²⁴

§ 216. Same continued—taxing power.

The state, under the police power, may tax a foreign telegraph company doing business within its borders. This brings us to a subject of much interest and one to be further discussed—that is, whether such companies fall within the laws of interstate commerce, and thereby to be controlled by Congress; or whether the state can have such control. Congress is vested, to a limited extent, for special purposes, with the exercise of the police power. One of these special purposes, in which it may exercise this right, is the power of regu-

²² Bouvier's Institute, § 442.

²³ *People v. Squire*, 145 U. S. 175, 12 S. Ct. Rep. 880. Aff'g. 107 N. Y. 593, 1 Am. St. Rep. 893; *Allentown v. West U. Tel. Co.*, 148 Pa. St. 117, 23 Atl. 1070; *West U. Tel. Co. v. Philadelphia*, 12 Atl. 144; *Forsythe v. Baltimore, etc. Tel. Co.*, 12 Mo. App. 494.

²⁴ *West U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 S. Ct. Rep. 1126. See, also, *Cooley v. Board of Port Wardens*, 12 How. (U. S.) 299; *West U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 S. Ct. Rep. 961; *American U. Tel. Co. v. West U. Tel. Co.*, 67 Ala. 31, 42 Am. Rep. 90.

lating and controlling interstate commerce, and this power is within the exclusive control of Congress. The state has the like exclusive power, subject to no limitation save that of the constitution of the United States, to control all of the commerce carried on within its borders. Intelligence transmitted by means of electricity is commerce, and when it is being transmitted from one state to foreign states, to any of the territories, or within the District of Columbia, it is exclusively under the control of Congress. All telephone lines running from one state to any other, and all connecting lines, even though they may be wholly within the state, are subject to the control of Congress. But if any business is carried on over these lines within the boundary of any state, and the same is not business of a governmental nature, it is subject to the control of the state and may be taxed as any other property therein.²⁵ "Considered purely as a foreign corporate body, deriving its powers from a charter granted by the state of New York, the state of Alabama has the power to prescribe police regulations for its government within its boundaries, and to tax its property situated there for purposes of revenue, having due regard that no unjust discrimination be made."²⁶ The state has the same power to tax domestic telephone companies for the purpose of obtaining revenue as it has to tax any other property in the state. The police power to raise revenue by taxation may be vested in municipalities. They have the power under an ordinance to tax domestic telephone companies doing business within the city limits.²⁷

§ 217. Same continued—penalty for delay in delivering messages.

The state may, under its police power, impose a penalty on a telegraph company for a failure to deliver a message promptly when properly tendered. These statutes are penal and must be strictly construed in the same manner as all other penal statutes. Thus, the

²⁵ *Osborne v. State*, 33 Fla. 162, 14 So. 588, 25 L. R. A. 120, 39 Am. St. Rep. 104; *People v. Wemple*, 27 Am. St. Rep. 547; *Com. v. Smith*, 92 Ky. 38, 36 Am. St. Rep. 578; *City of Bloomington v. Bourland*, 137 Ill. 534,

27 N. E. 692, 31 Am. St. Rep. 382; *State v. French*, 109 N. Car. 722, 14 S. E. 382, 26 Am. St. Rep. 590.

²⁶ *Moore v. Eufaula*, 11 So. 921.

²⁷ *Southern Bell, etc., Tel. Co. v. D'Alemberte*, 21 So. 370.

penalty imposed cannot ordinarily be enforced where the failure of duty on the part of the company occurs beyond the jurisdiction of the state.²⁸ The court, speaking on this subject, said: "The attempted regulation by Indiana of the mode in which messages sent by telegraphic companies doing business within her limits shall be delivered in other states cannot be upheld. It is an impediment to the freedom of that form of interstate commerce which is as much beyond the power of Indiana to interpose as the imposition of a tax by the state of Texas upon every message transmitted by a telegraph company within her limits to other states was beyond her power. Whatever authority the state may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other states."²⁹ While this is the general and accepted rule, some courts have held, that these penalties can be enforced when the message is sent beyond the state, on the ground that the duty to send attaches in the state in which it was tendered, that the breach occurs in that state, and that the penalty necessarily attaches there;³⁰ these cases, however, have been reversed by the federal court.³¹ These penalties may be enforced for a failure to deliver within a reasonable time a message which has been sent from without a state,³² or sent through other states to points within.³³

§ 218. Same continued—the Pendleton case—what embraced.

The decision of the United States Supreme Court, in the Pendleton case, was confined to the particular point at issue and is not to be given too extensive an application. Thus, where there is a refusal or total failure to transmit, the sender may enforce the statutory penalty, although the point of destination was in another state. So, also, where the wrong complained of is a refusal to deliver, or a delay in delivery, the addressee, if the statute allows an action by him, may

²⁸ *Alexander v. West. U. Tel. Co.*, 67 Miss. 336, 7 So. 280; *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 S. Ct. Rep. 1126; *Little Rock, etc., R. Co. v. Davis*, 41 Ark. 79.

²⁹ *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 S. Ct. Rep. 1126.

³⁰ *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 698.

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³¹ *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 S. Ct. Rep. 1126.

³² *West. U. Tel. Co. v. James*, 16 S. E. 83; *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 599.

³³ *Leavell v. West. U. Tel. Co.*, 116 N. Car. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. Rep. 798.

enforce the penalty though the message is sent from a foreign state. All that was decided in the Pendleton case was that a state cannot enforce the performance of a duty beyond its borders, and the fact that the message is sent from one state into another does not deprive either state of the right to enforce the performance, within its borders, of the duties of the company engaging to transmit it. This view would follow from the accepted principles that a state may enforce the performance of the obligations of a public company though it is engaged in interstate commerce, and that a state law is not invalid merely because it incidentally affects interstate commerce.³⁴

§ 219. Same continued—must fall within meaning of statute.

These statutes are penal and subject to the rules of construction which obtain in respect to same, and which require that "no case shall be held to fall within it which does not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment."³⁵ Thus, where a statute imposed a penalty for failure to "receive and transmit a message promptly, and with impartiality and good faith, the company could not be held liable under this statute on the sole ground, as alleged, to transmit and deliver it."³⁶ "There is no doubt but that the company undertakes to deliver, under reasonable rules and regulations, messages transmitted over its wires, and it must respond in damages to those who are injured by its neglect of duty. But the question is, has the legislature imposed a penalty for the refusal to perform that duty as it has for the refusal to perform the duty of transmitting a message? The terms of the act are confined to a refusal to transmit over the wires,"³⁷ and the act is confined strictly to these words and not to any which might be inferred. The sender of a message is not, under these statutes, entitled to recover the penalty therein named for a failure by the company to deliver such message with due diligence, unless the charges thereon were prepaid or tendered by the sender, or unless there was a fail-

³⁴ *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 S. Ct. Rep. 1126; *Peck v. Chicago, etc., R. Co.*, 94 U. S. 164; *Louisville, etc., R. Co., v. Railroad Com.*, 19 Fed. 679.

³⁵ *Barnett v. West. U. Tel. Co.*, 39 Mo. App. 599.

³⁶ *Brooks v. West. U. Tel. Co.*, 19 S. W. 572.

³⁷ *Id.*

ure to deliver, or delay in delivering, on or after payment or tender by the sender or his agent.³⁸

§ 220. Same continued—offices established—must keep open.

When a telegraph company once establishes an office, it must not discontinue the same without the consent of the state; and the fact that the income from such office is not sufficient to defray the expense in keeping it up will not be grounds for the company to close same. A case involving this point was that of a foreign company, it being claimed that it had never asked or received from the state in which it was being prosecuted, any grant, franchise, privilege or immunity, but that it secured its rights to erect its lines along the post-roads in the state by virtue of authority derived from an act of Congress; yet the court held that it was subject to such reasonable police regulations as the state saw proper to impose for securing conveniences to the people; and the fact that it does receive its powers from Congress, does not release it from any and all local public regulations.³⁹

§ 221. Same continued—other regulations.

The state may provide such other regulations for these companies as the necessities of the state may require. It may provide the rates to be charged for all messages sent to all points within the state; that they shall not discriminate among its patrons; that they shall furnish equal facilities to all; and that all foreign companies shall comply with all the requirements exacted of domestic concerns, and also with all the conditions required of other foreign corporations; for instance, they must file their charter with the secretary of state and have an agent within the state upon whom process may be served. The constitution of Alabama provided that no corporation should do business within the state "without having at least one known place of business and an authorized agent or agents therein." In this state, one telegraph company attempted to enjoin another from interfering with the construction and operation of its line. The former company had

³⁸ Langly v. West. U. Tel. Co., 88 Ga. 777, 15 S. E. 291.

³⁹ West. U. Tel. Co. v. Railroad Co.

⁴⁰ 4 Miss. 80, 21 So. 16; Railroad Co.

v. West. U. Tel. Co., 113 N. Car. 213, 18 S. E. 389, 22 L. R. A. 570. See also

Mayo v. West. U. Tel. Co., 112 N. Car.

343, 16 S. E. 1006.

not complied with this condition and the injunction was therefore denied: although it was denied on the ground that no right to such relief was shown to exist. The court further held that the constitutional provision quoted did not conflict with the federal constitution, saying: "The mandate of section 4, article 14, of the constitution of Alabama, which requires foreign corporations to have a known place of business and an authorized agent, is just as much a police regulation for the protection of the property interest of the citizens as a law forbidding vagrancy among its inhabitants. It does not impede or obstruct unreasonably any right conferred on foreign telegraph corporate companies by the act of Congress and is therefore free from constitutional objections."⁴⁰ The state may also restrict the company's owner to limit its liability, by declaring invalid stipulations in the contract of sending in so far as such stipulations operate to relieve the company from liability for negligence.⁴¹

§ 222. Same continued—limitation—impairment of contract.

The state is limited in its control over these companies, in that it cannot exercise a power which is exclusively within the rights of Congress; nor can it make provisions which would impair the obligations of a contract and the same to be in favor of a vested right.⁴² Thus, a municipal ordinance granting to a particular company authority to construct and maintain telegraph lines along the streets without limitation as to time, and for a stipulated consideration, when accepted and acted on by the company by a compliance with all conditions, and by the construction of an expensive plant, acquires the feature of a contract, which the city cannot afterwards annul or alter in its essential terms without the company's consent.⁴⁴ In this case cited the

⁴⁰ *American U. Tel. Co. v. West U. Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90. See also *Singer Mfg. Co. v. Hardee*, 4 N. Mex. 175, 16 Pac. 605; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 S. Ct. Rep. 739; *Philadelphia Fire Assoc. v. N. Y.*, 119 U. S. 110, 7 S. Ct. Rep. 108.

⁴¹ *Kemp v. West U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363.

⁴² *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518.

⁴⁴ *New Orleans v. Great Southern Tel. Co.*, 40 La. Ann. 41, 3 So. 533; *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303, 8 Atl. 123; *Northwestern Tel. Exch. Co. v. Anderson*, 12 N. Dak. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771.

city attempted to impose an additional burden on the company in the shape of a tax. It claimed the right under a section of the original ordinance which provided that "all the acts and doings of said company under this ordinance shall be subject to any ordinance that may hereafter be passed by the city council concerning the same." It was held, that the city could not thus impair the contractual obligation: the court considering that "the city's construction of this section is strained and unreasonable, and conforms neither to its spirit nor letter."⁴⁵

§ 223. Regulate charges.

Telegraph and telephone companies are engaged in a "business affected with a public interest" within the meaning of the rule laid down in a leading case,⁴⁶ and the state in the exercise of the police power may, therefore, regulate the charges for such companies, and provide a maximum rate which these charges shall not exceed.⁴⁷ One of the fundamental principles of law is, that when individuals invest their money in an enterprise in which the public has an interest, the enterprise must be regulated by the government in such a manner as to prevent its general welfare from being interfered with. Telegraph and telephone companies—whether they have become incorporated or whether they are being conducted by private citizens as a private enterprise⁴⁸—are carrying on a business in which the public has an interest, and to such an extent of public interest they must be controlled by the public. It is an undisputed fact, and one which it is unnecessary to discuss, that the states may regulate the charges on all common carriers which are carrying on a business to all points within

⁴⁵ See note 44 for cases.

⁴⁶ *Munn v. Illinois*, 94 U. S. 113, affg. 69 Ill. 80; *Cooley's Const. Lim.* (4 Ed.) p. (594) 743; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559n.

⁴⁷ *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238; 22 S. Ct. Rep.: 881; *Hockett v. State*, 105 Ind. 259, 59 Am. Rep. 207; *Central U. Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721; *Johnson v. State*, 113 Ind. 143, 15 N. E. 215; *Central U. Tel. Co. v. State*,

118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Railroad Com'rs v. West*, U. Tel. Co., 113 N. Car. 213, 18 S. E. 389, 22 L. R. A. 570; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 9 Am. St. Rep. 370, 2 L. R. A. 278n; *Nebraska Tel. Co. v. State*, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; *Mayo v. West*, U. Tel. Co., 112 N. Car. 343, 16 S. E. 1006.

⁴⁸ *Hockett v. State*, 105 Ind. 259, 59 Am. Rep. 201.

their jurisdiction.⁴⁹ Under statutory enactments, telegraph and telephone companies have become common carriers of intelligence and are, therefore, to be governed and controlled by the laws applicable to other common carriers; however, it is not necessary in order to give the state control over the charges of these companies, for statutes to be passed, declaring them common carriers.

§ 224. Same continued—constitutionality of statutes.

It has been attempted to be shown that these statutes, which regulate the charges of these and other similar institutions are unconstitutional, in that they attempt to divest persons of property without due process of law, which is prohibited under the fourteenth amendment of the constitution of the United States. The case of *Munn v. Illinois*⁵⁰ is a direct authority upon this question. This case was carried to the United States Supreme Court on a writ of error, to review a judgment of the supreme court of the State of Illinois, which affirmed the constitutionality of a statute of that state fixing a maximum charge for the elevation and storage of grain in warehouses in that state. The act was challenged as a violation of the constitutional guaranty in the constitution of Illinois protecting life, liberty and property, and which was expressed in substantially the same language as that found in the constitutions of almost all other states. The supreme court of the United States affirmed the judgment of the state court, on the ground that the legislation in question was a lawful exercise of legislative power, and did not infringe upon this clause of the federal constitution.⁵¹ As was said by an eminent jurist on this subject: "There is no doubt that the general principle is favored, both in law and justice that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises, and make use of them, and he have a monopoly in them for the purpose, if he will take the benefit of that monopoly he must, as an equivalent, perform the duty attached to it on reasonable terms."⁵² "Where an employment becomes a matter of such public interest and importance as to create a

⁴⁹ *People v. Budd*, 117 N. Y. 1, 15 Am. St. Rep. 460, 5 L. R. A. 559n.

⁵⁰ *Munn v. Illinois*, 94 U. S. 113.

⁵¹ *Id.*

⁵² *Alnutt v. Ingles*, 12 East 527.

common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."⁵³

§ 225. Same continued—right to fix charges—reason.

From the earliest period of the common-law practice it has been held that common carriers were under obligations to transfer property for a reasonable compensation. They were not at liberty to charge whatever sum they pleased; but where the price of carriage was fixed by the contract or convention of the parties, the contract was not enforceable beyond the point of a reasonable compensation. It is said that the control which the legislature is permitted to exercise over the business of common carriers, is a survival of that class of legislation which, in former times, extended to the details of personal conduct and assumed to regulate the private affairs and business of men in the minutest particulars.⁵⁴ The principle of the common law, that telegraph and telephone companies must serve the public for a reasonable compensation, becomes a part of the law of the states, when they were declared common carriers by statutes. As it is within the power of the legislature to enforce upon these companies the duty to make only reasonable charges, it is but reasonable that it may fix and define the maximum charges for their services, and punish the wrongdoer for exceeding them.⁵⁵ Whenever there is a general right on the part of the public, and a general duty cast upon any other with respect to such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise and practical rule for declaring, establishing, and securing such right and enforcing respect for such.⁵⁶

§ 226. Same continued—cannot evade statutes—charged in two items—patents.

Where a statute exists which regulates such charges, the telephone company cannot indirectly evade its operation. Thus, it cannot ex-

⁵³ Sinking Fund Case, 99 U. S. 747.

⁵⁴ *People v. Budd*, 117 N. Y. 1, 15 Am. St. Rep. 460, 5 L. R. A. 559n.

⁵⁵ *People v. Budd*, 117 N. Y. 1, 15 Am. St. Rep. 460, 5 L. R. A. 559n.;

Munn v. Illinois, 94 U. S. 113; *Sawyer v. Davis*, 136 Mass. 2289, 49 Am. Rep. 27.

⁵⁶ *Com. v. Alger*, 7 Cush. 53.

ceed the maximum rate by pretending to divide the charges into two items, one being designated as the regular rental and the other as a monthly charge for the use of the instruments by non-subscribers. This evasion was attempted to be made under an Indiana statute which provided that any person owning or operating a telephone line who charges and collects for the use of a telephone only, a sum in excess of three dollars per month, shall be punished by fine. It was held that a person who charges and collects the sum of three dollars per month as rental for the subscriber's use, and the sum of one dollar per month as rental for the use of non-subscribers, is guilty of the offense prohibited: "For, divide the four dollars as he might, and designate the items as he might, the fact remains and is apparent, that defendant did thereby charge, collect, or receive, for the use of one telephone only, a sum in excess of three dollars per month."⁵⁷ Nor can it exceed the rate prescribed by attempting to charge a certain sum for each conversation, instead of charging a regular rental as where what is known as the exchange and rental system is abandoned and another system is substituted therefor, under which all persons must resort to stations fixed by the companies where telephones are kept to be used upon payment of a certain toll.⁵⁸ Nor can it be evaded by making separate charges for the use of various parts of the instruments; as where the telephone company attempted to collect for the rental of one magnetic telephone and battery transmitter and for labor and service charges for switching, construction and maintenance charges for lines, batteries, central office apparatus, magnetic bell and other appurtenances, and the same exceeding the maximum sum prescribed by statute. It was held that all these separate instruments fell under and were comprehended by the term "telephone," and could be charged for only in the aggregate.⁵⁹ But it has been held that where the law fixes the maximum rate for a telephone on a separate wire, the statute is not violated by additional charges for equipments, such as auxiliary bells.⁶⁰ The fact that telephone lines are operated under patents, granted by the general government,

⁵⁷ *Johnson v. State*, 113 Ind. 143, 15 N. E. 215.

⁵⁸ *Central U. Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 598, 10 Am. St. Rep. 114.

⁵⁹ *Hockett v. State*, 105 Ind. 259, 55 Am. Rep. 209.

⁶⁰ *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 22 S. Ct. Rep. 881.

in no way affects the right of the states to regulate the charges on these companies. As was said by the court: "We are of the opinion that the right conferred upon the patentee and his assigns to use and vend the corporal thing brought into existence by the application of the patented discovery, must be exercised in subordination of the police regulation which the state established by statute."⁶¹

§ 227. Statute rates must be reasonable.

The maximum rate prescribed by these statutes must not be unreasonable. So, if it appears that the maximum rate allowed is less than the actual cost of service, the regulation is unconstitutional as denying to these companies the equal protection of the law.⁶² A law which is not reasonable in its purposes is no law; so, if the legislative power grants to a corporation the franchise to carry on a legitimate corporate business, and then prescribes for them certain duties to perform and a compliance with them would necessitate its carrying on the business at a constant loss, the requirements would be unreasonable at the outset and of course not binding. The charges must be such as that the company may be enabled to pay all expenses for carrying on the telephone business, with a reasonable margin above this to pay the company a sufficient income on the money invested. Of course, this statement has reference to a paying concern, and not to such as is carrying on an unprofitable or losing business; the charges must, however, be the same on both, as there can be no discrimination in charges. It is rather difficult to estimate what would be a reasonable rate to be charged, but a great number of statutes have been enacted—and the same have been held to be constitutional in this respect—which fix the maximum rate at three dollars per month for each subscriber.

§ 228. As to interstate messages—cannot fix maximum charges.

The state is without power to regulate the charges on interstate messages. Such messages fall under the head of interstate commerce, and the charges therefore are subject alone to regulations prescribed

⁶¹ *Hockett v. State*, 105 Ind. 259, 55 Am. Rep. 209.

⁶² *West. U. Tel. Co. v. Wyatt*, 98 Fed.

335; *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 22 S. Ct. R. 881.

by Congress. A statute⁶³ in Indiana provided that every telegraph company in the state should receive dispatches from persons or from other lines, and on payment of the usual charges "transmit the same with impartiality and good faith in the order of time in which they were received, under penalty" of one hundred dollars. The statute also provided for the preference of certain messages, and for the delivery of all messages by a messenger of the receiving office. When the validity of the statute was tested in the state court, upon the issue as to whether the sender of a dispatch from a place in Indiana to a place in Iowa could recover the penalty because the company's agent in the former state failed to deliver the dispatch by a messenger as required, it was held by an undivided bench that the statute was valid and constitutional, and that the plaintiff might recover the penalty.⁶⁴ But the decision of the state court was reversed on a writ of error in the United States Supreme Court, which held that such statute could be enforced only as to messages sent between points both of which were within the state.⁶⁵

§ 229. Must furnish services notwithstanding charges.

Where statutes have been passed fixing the maximum rates on telephone companies and the same are reasonable charges, and a penalty is prescribed for the violation of its provision, these facts do not abridge the right of an aggrieved party to compel the telephone company to furnish him with the service to which he is entitled. The remedy for the aggrieved party is generally by a writ of mandamus.⁶⁶

§ 230. Municipal control.

After having discussed at some length the control which the federal and state governments have over the construction and maintenance of telegraph and telephone companies, and the manner and extent to which they may exercise this power, we now take up the subject with

⁶³ Rev. Stat. §§ 4176-78.

⁶⁴ *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692; *West. U. Tel. Co. v. Meredith*, 95 Ind. 93.

⁶⁵ *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347, 7 S. Ct. Rep. 1126.

⁶⁶ *Central U. Tel. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 121; *State v. Tel. Co.*, 36 Ohio St. 296; *Bell Tel. Co. v. Com.* (Penn.) 3 Atl. 825.

respect to the powers of municipalities exercising this authority over these companies doing business within their limits. The power to regulate and control the management of streets rests primarily in the state as one of its inherent police powers. It may prescribe the manner in which all the streets shall be laid out and the uses to which they may be put. In fact, it may make all such regulations with respect to the control over these as will tend to the protection of health, the security of property and safety of life. It has been contended by many learned in the law that this power could only be exercised by the state;⁶⁷ but it is now held by the greater preponderance of authority that the power may be delegated to the municipality.⁶⁸ There can be no doubt that it is competent for the general assembly to delegate to municipalities the power to enact ordinances which, when authorized, have the force and effect of laws passed by the legislature of the state, within the corporate limits;⁶⁹ and within the sphere of their delegated powers, municipal corporations have as absolute control as the general assembly would have, if it had not delegated such powers.⁷⁰

§ 231. Powers limited—generally specified.

Of course, the class of powers which it is competent for the legislature to delegate to municipal corporations is limited to such as have reference to matters which form appropriate subjects for municipal regulation. The power granted must be one which relates to legitimate and proper municipal purposes. It must be local in its general character as well as in its operation.⁷¹ The powers delegated to municipal corporations to control their streets are generally prescribed in the municipal charter or in the general statutes, and the limit of authority may be delegated in a general way; and, again, the powers are unlimited; or the powers delegated may be specifically given; and where this is the case, the municipality cannot exceed these powers.⁷² Thus, the state may delegate to municipalities a general power to

⁶⁷ *Ingersoll*, 230.

⁶⁸ *Id.*

⁶⁹ 1 *Dill. on Mun. Corp.* § 245.

⁷⁰ *Taylor v. Carondelet*, 22 Mo. 110; *Heland v. Lowell*, 3 Allen 408.

⁷¹ *Howe v. Plainfield*, 37 N. J. L. 146.

⁷² *Ingersoll* 377; 1 *Dill. on Mun. Corp.* (3 Ed.) § 89; *St. Louis v. McLaughlin*, 49 Mo. 652; *St. Louis v. Herthel*, 88 Mo. 128.

manage and regulate the construction and maintenance of telegraph and telephone lines within their limits, and this power is generally held to be included in the delegation of a general power of police control over streets.⁷³ Often the streets are lined with an intricate web of wires, actually or potentially charged with electric currents, which are dangerous unless approached with caution. These wires are not for telephone purposes alone, but also for the transmission of electricity, and as a source of motive power and illumination. To permit these wires to be indefinitely increased upon the streets, without some power to regulate the manner of their construction, would be a source of annoyance and inconvenience to the municipality. So, when the general power of police regulation is delegated to a city, the power to regulate the construction and maintenance of these lines will be included therein. The municipality may, under the police power delegated to it, prescribe the exact location of poles. In granting a franchise to one of these companies to construct a line upon the streets, it may require the company to furnish a map showing the exact location for the poles.⁷⁴ It may require that the poles shall be of such size and character as not to endanger persons using the streets, and that they shall not be unsightly.⁷⁵ It may require that the wires shall be a certain height above the surface of the streets, and to cross other wires at a certain angle. And in certain cases, where the conditions are such as warrant their removal entirely, the city may compel the company to dispense with their use and to place them underground.⁷⁶ All restrictions imposed by a city must be reasonable.⁷⁷

⁷³ *Allentown v. West. U. Tel. Co.*, 148 Penn. St. 117, 23 Atl. 1070; *West. U. Tel. Co. v. Philadelphia*, 12 Atl. 144; 2 Dill. on Mun. Corp. (4 Ed.) § 698.

⁷⁴ *Anerbach v. Cuyahoga Tel. Co.*, 9 Ohio Dec. 389, 7 Ohio N. P. 633.

⁷⁵ *Forsythe v. Baltimore, etc., Tel. Co.*, 12 Mo. App. 494; *Hardwick v. Vermont, etc., Tel. Co.*, 70 Vt. 180, 49 Atl. 169.

⁷⁶ *People v. Squire*, 145 U. S. 175, 12 S. Ct. Rep. 880, affg. 107 N. Y. 593, 1 Am. St. Rep. 894; *Mutual U. Tel. Co. v. Chicago*, 16 Fed. 309; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641,

21 Am. St. Rep. 764, 13 L. R. A. 454n. affg. 58 Hun (N. Y.) 610; *Anerbach v. Cuyahoga, Tel. Co.*, 9 Ohio Dec. 389, 7 Ohio Np. 633; *Baltimore v. Chesapeake, etc., Tel. Co.*, 92 Md. 692, 48 Atl. 465; *Geneva v. Geneva Tel. Co.*, 30 Misc. (N. Y.) 336.

⁷⁷ *Summit T. P. v. New York, etc., Tel. Co.*, 57 N. J. Eq. 123, 41 Atl. 146; *Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 83 N. W. 527, 53 L. R. A. 175; *Seaboard Tel., etc., Co. v. Nearny*, 68 N. Y. App. Div. 283; *American U. Tel. Co. v. Harrison*, 31 N. J. Eq. 627.

§ 232. Power to revoke franchise.

The municipal authority very clearly has the right to couple with the permission to use the streets, such conditions as the occupancy of the streets by the company's posts and wires suggest;⁷⁸ but this authority cannot at its mere will annul the act⁷⁹ which has legalized the occupation of the streets, and so leave the company's property impressed with the character of a nuisance which could be at any time abated.⁸⁰ For instance, if the power to regulate and control the construction and maintenance of these companies has been delegated to a municipality and permission has been given to the former, under such authority, to construct their lines along the streets after complying with all the conditions required, the same cannot be revoked without good cause, when the franchise or license has been accepted, great expense has been incurred and all conditions have been complied with.⁸¹ But, under the power of police authority, these municipalities may make such changes in the grant to these companies when the same is for the interest of the public; provided, vested rights are not impaired. Thus, a city may require the wires to be placed underground where the condition or circumstances requires that the same be done.⁸² When permission has been granted to these companies to construct a line of wires along the streets, they will not be treated as trespassers, and their works declared a nuisance, if they are so constructed as not to interfere with the use of the streets by the public.⁸³ But if they should become a nuisance for any reason, the city authority has a right to abate their works by virtue of its general power to protect the public interest in the streets.⁸⁴

⁷⁸ 1 Dill. On Mun. Corp. §§ 555, 558, 575.

⁷⁹ *Northwestern Tel. Exch. Co. v. Anderson*, 12 N. Dak. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771.

⁸⁰ *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123.

⁸¹ *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619; *Northwestern Tel. Exch. Co. v.*

Anderson, 12 N. Dak. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771.

⁸² See note 76 for reference cases.

⁸³ *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193.

⁸⁴ *New York, etc., Tel. Co. v. East Orange*, 42 N. J. Eq. 490, 8 Atl. 289; *Mut. U. Tel. Co. v. Chicago*, 16 Fed. 309.

§ 233. Cannot impose tax or license—not police power.

It has been held that a telegraph company whose business is the transmission of messages from one state to another and which is invested with the powers and privileges conferred by Congress, cannot be forced by the state, as a condition of doing business in its jurisdiction, to pay a license tax, the same being free from the control of state regulations, except such as are strictly of a police character.⁸⁵ It, therefore, follows that a city which derives all its powers from the state has no authority, under the power to regulate the control of the streets, to impose a license on these companies. Licenses for this purpose do not fall under the head of police power and subjected, therefore, to the state control.⁸⁶ But a municipal corporation has a right, and it is its duty in the exercise of the police power, to supervise and control the erection and maintenance of telegraph and telephone poles and wires within its limits, and if the license is imposed for the purpose of inspecting this work, it will fall under the police power and therefore subject to such license;⁸⁷ or if the imposition is in the nature of a rental,⁸⁸ it may be enforced. Thus, where an ordinance compelling a telegraph company to pay five dollars per annum for every pole within the city "for the privilege of using the streets, alleys and public places," is a charge in the nature of a rental, and it makes no difference that these companies are doing interstate business; but the charges imposed must be reasonable, which is a subject open to judicial investigation.⁸⁹ It has been held that five dollars for each pole per annum was not an unreasonable charge.⁹⁰ The legislature may, in express terms, delegate the power to a city to impose a tax or license on these companies, where the same is not done by the state, yet this delegated power will not give the city the

⁸⁵ *Leloup v. Mobile*, 127 U. S. 640, 8 S. Ct. Rep. 1380.

⁸⁶ *New Orleans v. Great Southern Tel. etc., Co.*, 3 So. 533.

⁸⁷ *Leloup v. Mobile*, 127 U. S. 640, 8 S. Ct. Rep. 1380; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828.

⁸⁸ *Allentown v. West. U. Tel. Co.*, 148 Pa. St. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; *Philadelphia v. Postal Tel.*

Cable Co., 21 N. Y. Supp. 556; *Chester v. West. U. Tel. Co.*, 152 Pa. St. 464; 25 Atl. 1134; *West. U. Tel. Co. v. Philadelphia*, 12 Atl. 144.

⁸⁹ *St. Louis v. West. U. Tel. Co.*, 39 Fed. 59; *New Orleans v. Great Southern Tel. Co.*, 40 La. Ann. 41, 3 So. 533.

⁹⁰ *St. Louis v. West. U. Tel. Co.*, 39 Fed. 59.

power to make such an imposition on the business of interstate commerce: and while these companies may be doing an interstate commerce business, yet business which is carried on exclusively within the state may be subject to such taxes.⁹¹ The same rule, which applies to the reasonableness of charges as rental of the space occupied by the poles of these companies, applies to the taxes which the municipality has the power to impose under the delegated authority. In other words, the taxes imposed on these companies as a purpose of revenue must not be excessive.⁹² What is a reasonable charge is a question of fact, and what would be reasonable in one instance might not be in another. For instance, if the poles were in a crowded and busy part of the city, the amount to be charged should not be the same as that which should be imposed in a small country town where the property is not so expensive.⁹³

§ 234. Cannot regulate rate—without express authority.

A municipal corporation cannot regulate the charges for services unless the right has been expressly delegated to it, as this right is not embraced in the general police power of the city. There is no question but that this power may be delegated to the municipality, yet it must be done in express terms. As the city government is only a part of the whole government which constitutes the commonwealth and is, therefore, subservient to the management of the whole, it can not enforce any rule of law which would be inconsistent with the whole; but can exercise only such powers as may be delegated to it, in clear and in expressed terms. The question as to whether the municipal corporation has the right to regulate the charges for telephone services, doing business within its limits, was declared in a case which went up from the City of St. Louis. The charter of this city gave the mayor and the assembly power "to license, tax, and regulate telegraph companies or corporations," and it might "pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the state, as may be expedient, in maintaining the peace, good government, health, and welfare of the city, its trade, commerce

⁹¹ Moore v. Eufaula, 11 So. 921.

⁹² St. Louis v. West. U. Tel. Co., 39

⁹³ St. Louis v. West. U. Tel. Co., 39 Fed. 59.

Fed. 59; Chester v. West. U. Tel. Co., 153 Pa. St. 464, 25 Atl. 1134.

and manufactures." The court held in that case, that the fact that the city had to regulate the use of the streets with respect to the construction of the telephone lines thereon, did not give it the right to regulate the charges for telephone services, nor did it have the power, under its charter, to regulate the rate under its general police power.⁹⁴

⁹⁴ St. Louis v. Bell Tel. Co., 96 Mo. 370; State v. Sheboygan, 111 Wis. 23. 623, 2 L. R. A. 278n, 9 Am. St. Rep. 86 N. W. 657.

CHAPTER XII.

DUTIES TO FURNISH EQUAL FACILITIES TO ALL.

- § 235. Telegraph—in general.
- 236. Same continued—duty to furnish.
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- 245. Statutes—declaratory of common law.
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§ 235. Telegraph—in general.

In discussing the subject of the duty of these companies to furnish equal facilities to all, we shall treat each company separately, as the manner in which the business of the two is conducted differs slightly in some respects.¹ The law applicable thereto, therefore, is not the same at all times. It is not our purpose to be understood as saying that there is such material difference in the way the business of the two is carried on that the law, with respect to this subject, could not be applied equally to both, for such is not our purpose, but that the two may be satisfactorily treated separately in such a way as may be more clearly understood by the reader. We shall first refer to

¹ Central U. Tel. Co. v. Falley, 118 Ind. 494, 10 Am. St. Rep. 114, 19 N. E. 604.

the duty of telegraph companies to furnish equal facilities to all who comply with their reasonable regulations.

§ 236. Same continued—duty to furnish.

Telegraph companies are not common carriers under the common law, but have been declared to be such by statutes in most of the states and are thereby made subject to all the laws applicable to common carriers. They may or may not become incorporated, but if they have the power to exercise some of the rights of the government, such as the right of eminent domain, they are then impressed with a public interest and are under a legal obligation to serve with impartiality all who apply to them after complying with their reasonable regulations.² When the government grants to any corporation or person some of its rights, it takes in lieu thereof an interest in the granted business; and, when one is the owner of the property which is devoted to a public use and in which the public has acquired an interest, he, in effect, grants to the public an interest in such use and must, to the extent of that interest, submit to be controlled by the government for the common good as long as such is maintained.³ One of the great requirements which the government demands of every institution impressed with a public interest—and one which is thrown over every citizen as a great and protective shield—is the duty to act impartially with all.⁴ They are under obligations to extend their facilities to all persons, on equal terms, who are willing to comply with their reasonable regulation, and to make such compensation as is exacted for others in like circumstances.

§ 237. Must have sufficient facilities.

In order that a telegraph company may be able to carry out the duties which it owes to the government, it must in the first place equip its business so that all unfavorable emergencies may be dispensed

² *State v. American, etc., Commercial News Co.*, 43 N. J. L. 381; *West. U. Tel. Co. v. Call. Pub. Co.*, 44 Neb. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 58 Neb. 192, 78 N. W. 519.

³ *Munn v. Illinois*, 94 U. S. 113; *In-*

ter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 75 Am. St. Rep. 184, 56 N. E. 822, 48 L. R. A. 568.

⁴ *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

with in the shortest possible time and in the most efficient and careful manner. It is the duty of a company to have sufficient facilities to transact all business offered to it for all points where it has offices; and if the press of business offered is so great that one wire or one operator at a point is not sufficient, it is the duty of the company to add another wire or an additional employee.⁵ It must not only have sufficient facilities to carry out its business, but it also must be provided with competent servants and suitable instruments for this purpose; and on a failure to do so, whereby injuries or losses are incurred, it must respond in damages.⁶ In the case of telephone companies, each person has the right to demand and receive a telephone and telephonic connections, facilities and services, and the best in use by such companies. Not only is it necessary that these companies should furnish the best facilities which they may have in use, but they must furnish the very best equipped and most up-to-date instruments to be used by any similar companies.⁷ These companies voluntarily engage in a public duty; they solicit the public to transact business with them on reasonable terms, and when they have placed themselves before the public to perform such business as may be tendered, they must exercise due care to carry out all such duties; and in order to do this, they must prepare and furnish the best instruments and extend impartial favors toward the public.

§ 238. Must transmit in order in which received.

One of the duties imposed upon telegraph companies is, that they must, with few exceptions, transmit all messages tendered them, after a reasonable compliance with their rules and regulations, in the order in which they are received.⁸ These companies are under a legal obligation to the public to carry out this part of their duties to-

⁵ *Leavell v. West. U. Tel. Co.*, 116 N. Car. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. Rep. 798; *West. U. Tel. Co. v. Hudson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843. See extended note in *West. U. Tel. Co. v. Blanchard*, 45 Am. Rep. 487.

⁶ *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 58 Am. St. Rep. 609, 34 L. R. A. 492.

⁷ *Central U. Tel. Co. v. Falley*, 118 Ind. 194, 10 Am. St. Rep. 114, 19 N. E. 604.

⁸ *Mackay v. West. U. Tel. Co.*, 16 Neb. 223; *Reutu v. Electric Tel. Co.*, 6 El. & Bl. 341, 88 E. C. L. 341.

ward the public for obtaining so great a right as that of assuming public functions and enjoying public immunities; and the same must be observed unless the statutes of the state, or public policy demands that certain other messages shall have precedence over these. In many states there have been statutes passed which require that messages be transmitted in the order in which they are received,⁹ but it seems that the companies are under this obligation even though there are no statutes to this effect. If they were permitted to exercise their own judgment with respect to the time and manner in which the messages should be delivered, partiality would in many instances be shown, which, as we heretofore said, could not be done. It necessarily follows, therefore, that messages should be transmitted in the order in which they are received, even in the absence of a statute to that effect. There are some messages which, through legislative enactments, are entitled to a preference over those which would otherwise have precedence; where such is the case, those messages—such as pertain to the government, those for and from officers of justice, and those for publication of general and public interest—have the right of way.¹⁰ It is considered, where the public—or any of its servants—is the sender of messages, that they are always of some consequence, and that not only one but many people are directly or indirectly interested in the results, and a failure to promptly and immediately send same in preference to those otherwise having priority, would inflict a loss not only upon one of its citizens but on many; for this reason some of the legislatures have seen fit to give them preference. It has also been held that these companies are under obligations to give preference to all private messages where they have been informed, either by the sender or by the face of the message, that their immediate transmission and delivery was of the utmost importance. It seems that such messages as these should have precedence over those given preference by statute, should the former clearly appear to be of more consequence than the latter. It is presumed that those given preference by statute are of much importance, but the presumption may be overcome if it clearly appears from an inspection of the private message that it is of greater importance than the former. The telegraph company is often ignorant of the real

⁹ Gray on Tel. § 20.

¹⁰ Gray on Tel. § 20 note 2.

meaning of a telegram; and, while it may be assured of its meaning, it cannot always know its full importance, as the importance of a message often depends on other circumstances surrounding the particular message. The company cannot, therefore, always know what importance should be given to messages, and if this fact should be left to its own consideration, it might often be mistaken in its judgment; and on this account preferences might be given to some which would not be thereto entitled. It is not a good policy anyway to give these companies this power; for they might take advantage of the power and give preference, many times, to messages which should be transmitted in the regular order in which they are received. It is, therefore, much the better policy to demand of them to transmit the messages in the order in which they are received.

§ 239. Discriminations—cannot make.

Telegraph companies are public servants, and it would be a violation of the duties which they owe to the public if they were allowed to unjustly discriminate with respect to their charges where the conditions are the same.¹¹ They are exercising public functions and are allowed the right to make reasonable charges for their services; but they must be imposed equally on all, where the circumstances are equal. This is a common-law principle and could be enforced in the absence of a statute to that effect. While the charges of these companies, which are carrying on interstate commerce business, should be regulated by the federal laws, and punishment imposed on all who violate same, yet in the absence of such laws the state may either by a constitutional provision or legislative enactment, pass and enforce such law even as to charges for interstate business. Many states of the Union—and England—have passed statutes prohibiting these companies from unjustly discriminating; it has been held that so far as these statutes affect civil actions—disregarding the penalties imposed—are they anything more than declaratory of the common

¹¹ *Hays v. Pennsylvania, etc., Co.*, 12 Fed. 311; *Chicago, etc., R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562; *Indianapolis, etc., R. Co. v. Ervin*, 118 Ill. 250, 8 N. E. 862; *St. Louis, etc., R. Co. v. Hill*, 14 Ill. App. 579; *Mc-*

Duffee v. Portland, etc., R. Co., 52 N. H. 430, 13 Am. Rep. 72; *West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 48 Am. St. Rep. 729, 62 N. W. 506, 27 L. R. A. 622.

law.¹² When it is incorporated in the constitutional provision that telegraph companies shall not unjustly discriminate in their charges, it must be construed as establishing the limits of legislative authority upon this subject, and not as giving authority to declare all discriminations as unjust¹³—as it will be seen in the following section.

§ 240. Same continued—discrimination—must be just.

It is not every discrimination which is unjust,¹⁴ since there may be conditions surrounding the particular case which would entitle telegraph companies to make discriminations among their patrons. These companies certainly have the right to demand a reasonable compensation for their services, and where the conditions pertaining to the transmission and delivery of messages are similar in every respect, they should not be permitted to discriminate in their rates; but in many cases the conditions are not similar and where this is the case, it is not unjust discrimination. It is not contrary to the common law nor is it contrary to the statute to make a difference in the charges. It has been held that the true rule on this subject is that the rates must not only be reasonable in themselves, but must be relatively reasonable; that is, they must first be reasonable, and then they must not, without a just and reasonable ground for discrimination, render to one patron services at a less rate than it renders to another, where such discrimination operates to the disadvantage of that other.¹⁵ They must not discriminate in rates between patrons so as to give one an undue preference over another. It is not an undue preference, however, to make to one patron a less rate than to the other, when there exist differences in conditions as to the expense or difficulty of the services rendered which fairly justifies such a difference in rates.¹⁶ This question was very elaborately discussed in a case in which a newspaper company instituted an action for damages against a telegraph company which was transmitting news for

¹² Id.

¹³ Id.

¹⁴ *Root v. Long Island R. Co.*, 114 N. Y. 300, 11 Am. St. Rep. 643; *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731; *Chicago, etc., R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599;

McDuffee v. Portland, etc., R. Co., 52 N. H. 439, 13 Am. Rep. 72.

¹⁵ *West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 526, 62 N. W. 506, 27 L. R. A. 622, 48 Am. St. Rep. 729.

¹⁶ Id.

the Associated Press at Chicago, for unjustly discriminating against the plaintiff and in favor of another paper company doing business in the same place. The Associated Press was furnishing news to both of these papers, but it was shown that the plaintiff was an evening paper—the other being a morning paper—and received its news during the day, when the telegraph company was necessarily very busily engaged in other general telegraphic business, and at a time when its wires could easily have been put to other uses. The other paper did not receive its news until night, and at a time when the defendant was not being rushed with work and incurring the expense to which it was subjected during the day. The court held in this case that, notwithstanding the fact that the news was transmitted over the same wire of defendant company, from the same place to the same place, and that the same amount of skill and care was necessary in both cases, yet the expense incurred in the transmission of messages to the plaintiff was so much greater than that incurred in the transmission to the other paper, that the defendant had the right to discriminate in the rates between the two, and that it was not an unjust discrimination.¹⁷

§ 241. Same continued—reasonable discriminations.

Where the conditions respecting the transmission of messages for two patrons are different, in that the expense and trouble incurred in the transmission of one is greater than in the other, the telegraph company may discriminate in the charges. Discriminations made in good faith, because of such differences in the expense of transmission—and proportional with reference thereto—are undoubtedly just, but it devolves upon these companies, relying upon such facts as a defense to a suit for unjust discrimination, to prove them to the satisfaction of the court.¹⁸ Thus, where the same messages are transmitted by the same company, from the same place to two patrons of the same place, but the messages are received at different times during the day and at times when the expenses and trouble in the transmission are different, the company may discriminate in its rates.¹⁹ A

¹⁷ *Id.*

¹⁸ *People v. Wabash, etc., R. Co.* 104 Ill. 476; *Portsmouth, etc., R. Co. v. Forsayth*, 59 N. H. 122; *St. Louis, etc., R. Co. v. Hill*, 14 Ill. App. 579.

¹⁹ *West. U. Tel. Co. v. Call Pub. Co.*

44 Neb. 326, 62 N. W. 506, 27 L. R. A. 622, 48 Am. St. Rep. 729.

telegraph company may also, unless restrained by statute, discriminate in favor of longer distances.²⁰ But these companies cannot discriminate against a person who refuses to patronize them exclusively.²¹ And it is not a legitimate ground for giving a preference to one patron that he engages to employ other lines of the company for the transmission of news distinct from and unconnected with the message in question.²² A telegraph company cannot discriminate in favor of itself or any of its employees as against other patrons.²³ A contract by which a telegraph company agrees to transmit for one person at cheaper rates than it was transmitting for other patrons and the public generally in like circumstances,²⁴ under the same conditions and for like distances, is void as creating an illegal preference and making an unjust discrimination. And a contract by which a telegraph company gives to a railroad company a preference over its lines to the exclusion of others, is an illegal discrimination and does not justify it in exacting an extra tariff for sending a message over the line of another company to a point at which it also has a line.²⁵ These companies cannot discriminate in favor of a patron

²⁰ *St. Louis, etc., R. Co. v. Hill*, 14 Ill. App. 579; *Hirsh v. Northern C. R. Co.*, 74 Pa. St. 188.

²¹ *Menacho v. Ward*, 27 Fed. 529; *Gwynn v. Citizens' Tel. Co.*, 69 S. Car. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819. In this last case a contract between a telephone company and a customer that the former would put in a telephone for the use of the latter on condition that he would not use another telephone system was held to be void as in restraint of trade and against public policy as tending to create a monopoly. See, also, *State v. Citizens' Tel. Co.*, 61 S. Car. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870, in which it was held that mandamus was the proper proceeding to compel a company to furnish services. *Central U. Tel. Co. v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 52 Am. Rep. 404. Manda-

mus, however, does not lie to compel the performance of an unlawful act: See note to *Dane v. Derby*, 89 Am. Dec. 731 and it could not be compelled to furnish facilities to a bawdy house: *Godwin v. Tel. Co.*, 136 N. Car. 258, 48 S. E. 636, 103 Am. St. Rep. 941, 67 L. R. A. 251.

²² *Baxendale v. Great Western R. Co.* 1 Nev. & Macn. 191; *Bellsdyke Coal Co. v. North British R. Co.*, 2 Id. 105.

²³ *Cumberland Valley R. Co.'s Appeal*, 62 Pa. St. 218.

²⁴ *Indianapolis, etc., R. Co. v. Erwin*, 118 Ill. 250, 8 N. E. 862; *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407, 13 Am. Rep. 451; 37 N. J. L. 531, 18 Am. Rep. 754; *Scofield v. Railway Co.*, 43 Ohio St. 571, 54 Am. Rep. 846, 3 N. E. 907.

²⁵ *Leavell v. West. U. Tel. Co.*, 116 N. Car. 211, 47 Am. St. Rep. 798, 21 S. E. 391, 27 L. R. A. 843.

having a large amount of business with them, as it tends to create monopoly, to destroy competition, and is contrary to public policy; ²⁶ neither can they give discriminatory rates to a particular person for the purpose of obtaining his business.²⁷

§ 242. Reasonableness of rates—how determined.

While the general rule is that the rates of telegraph companies must not only be reasonable in themselves but must be relatively reasonable, yet it is rather difficult in many cases, where it is claimed that there is an unjust discrimination between two patrons, to determine the reasonableness of one rate and the unreasonableness of the other; or, more strictly speaking, the relatively reasonable rates of the two, where a just discrimination can be made.²⁸ It has been held by some courts that no cause of action can be predicated upon the mere fact that another patron obtained services for a less rate, unless it be shown that the rate charged complainant is in itself unreasonable and excessive.²⁹ There must be some rate which is considered reasonable within itself or some standard of measurement to be used as a guide for the jury in determining the reasonableness of a rate, and whether or not this is relatively reasonable with another rate imposed, where the conditions respecting the transmission of the two are different. The jury must have some guide of this kind, in order to arrive at a proper conclusion; as was said: "How can it be said that a jury acts upon evidence and reaches a verdict solely upon consideration thereof when, having established a difference in rates and a difference in conditions, without anything to show how one difference affects the other, or to what extent it is permitted to measure one against the other, and to say that to the extent of one

²⁶ *Seofield v. Railway Co.*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846. See note 24 for other cases.

²⁷ *Hays v. Pennsylvania Co.*, 12 Fed. 309; *Seofield v. Lake Shore, etc., R. Co.*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; *London, etc., R. Co. v. Evershed, L. R.* 3 App. Cas. 1029; *West. U. Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 48 Am. St. Rep. 729, 62 N. W. 506, 27 L. R. A. 622.

²⁸ *Baxendale v. Eastern Counties R. Co.*, 4 Com. B. 63; *Great Western R. Co. v. Sutton*, 4 H. L. Cas. 239; *Johnson v. Pensacola, etc., R. Co.*, 24 La. Ann. 1; *Fitzbury R. Co. v. Gage*, 12 Gray 393; *Sargent v. Boston, etc., R. Co.*, 115 Mass. 222; *Ragen v. Aiken*, 9 Lea. 609, 42 Am. Rep. 684; *Menacho v. Ward*, 27 Fed. 529.

²⁹ *Johnson v. Pensacola, etc., R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

dollar or to the extent of one thousand dollars, the difference in rates was disproportionate to the difference in conditions? It may be said that it would be difficult to produce evidence to show to what extent such differences in conditions reasonably affect rates. This may be true, but the answer is that whatever may be the difficulties of the proof, a verdict must be based upon the proof, and a verdict must be founded upon evidence and not upon the conjecture of the jury or its general judgment as to what is fair without evidence whereon to found such judgment.”³⁰

§ 243. Telephone companies—furnish equal facilities.

Having considered the duty of telegraph companies to furnish equal facilities to all impartially, we shall now discuss the same duties which telephone companies must observe. It must be understood, however, that there are no material differences between the two companies with respect to this duty. As was said heretofore, there may be some very slight differences touching this subject, arising from the fact that they are differently manipulated. Under the common law, telephone companies were not in every particular common carriers, in that they were not insurers of a correct transmission of messages, but were liable only for injuries caused by their negligence; and while they were not common carriers in this respect, they were nevertheless under the same obligations to the public as common carriers to act impartially with all who applied to them, offering to comply with all their reasonable regulations. They have been made common carriers by statute in most of the states, but it was not necessary in order to impose on them the duty of serving the public impartially to enact such laws, as they were under the same obligation by common law. There is no difference between telegraph and telephone companies in this respect, and what has heretofore been said in regard to the duty of telegraph companies will apply to telephone companies. For instance, they both must furnish equal facilities to their patrons, transmit the messages in the order in which they are received, and not unjustly discriminate in the rates.

³⁰ West. U. Tel. Co. v. Call Pub. Co., 44 Neb. 226, 62 N. W. 506, 27 L. R. A. 622, 48 Am. St. Rep. 729.

§ 244. Same continued—whether private or incorporated concerns.

In some instances, telephone lines are constructed and owned by private unincorporated companies; the question then arises. Are they under the same obligation to furnish equal facilities to, and act impartially with, all who apply to them? They unquestionably are.³¹ As was said: "It is the nature of the service undertaken to be performed that creates the duty to the public, and in which the public has an interest, and not simply the body that may be invested with power."³² A man may use his money in any legal business he may see fit, and so long as it is not invested in an enterprise in which the public may have an interest, he will have exclusive control over same, or rather over the enterprise; but so soon as the money is invested in a business in which the public has an interest, the business must be, and is, under the control of the government to that extent.³³ These companies, whether owned by private individuals or by incorporated companies, necessarily exercise in the construction of their lines the power of eminent domain. They, then, are assuming public functions, and are therefore public servants to be controlled by the public as such. One of the duties imposed on all public servants, or enterprises of a public nature, is that they are bound to supply all alike who are in like circumstances with similar facilities, under reasonable limitations, for the transmission of news without any discrimination whatsoever in favor of or against anyone.³⁴ This question was settled in the case of *Munn v. Illinois*,³⁵ and has been adopted by nearly all the courts of the Union. In this case, Munn and his partner, Scott, invested their money in a grain elevator, built in the city of Chicago and strictly for a private enterprise, but the elevator was nevertheless being used by the public generally. Munn and Scott attempted to evade a statute which imposed a license tax on all concerns of this nature, on the ground that the business was private and could not therefore be taxed. Chief Justice Waite, in delivering

³¹ *State v. Nebraska Tel. Co.*, 17 Neb. 126, 52 Am. Rep. 404.

³² *Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 59 Am. Rep. 167.

³³ *Chesapeake, etc., Tel. Co. v. Balti-*

more, etc., Tel. Co., 66 Md. 399, 59 Am. Rep. 167.

³⁴ *State v. Citizens' Tel. Co.*, 61 S. Car. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

³⁵ *Munn v. Illinois*, 94 U. S. 113.

the opinion of the court, said: "Looking, then, to the common law, from whence came the right which the constitution protects, we find that, when private property is affected with public interest, it ceases to be *juris privati* only. This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise *De Portibus Moris*, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public convenience, and affects the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public, for the common good, to the extent of the interest he has thus created."³⁶

§ 245. Statutes—declaratory of common law.

There are statutes in many of the states imposing upon telephone companies the duty to furnish equal facilities impartially to all who apply to them, offering to comply with all of their reasonable regulations, but it has been held that these statutes were only declaratory of the common law on the subject.³⁷ These obligations are imposed by the demands of commerce and trade, and it would be idle to say they existed only by force of these statutes.³⁸ Thus, when a statute imposes a penalty on any company which refuses to receive a message for transmission over its wires from an individual or another company, the company, in the absence of such statute, could be forced by a writ of mandamus to perform such duty. It is an obligation which a company cannot avoid by reason of the fact that there are no penal statutes to that effect.³⁹

§ 246. Must furnish equal service and facilities.

These companies must not only furnish services and facilities to their subscribers, but they must furnish like services to all, on like

³⁶ *Id.*

³⁷ *Central U. Tel. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 409; *State v. Citizens' Tel. Co.*, 61 S. Car. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870;

State v. Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 584.

³⁸ *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404.

³⁹ *Central U. Tel. Co. v. Falley*, 118 Ind. 194, 10 Am. St. Rep. 114, 19 N. E. 604

terms.⁴⁰ Thus, they must furnish every person, who requests it, with a separate telephone and with telephonic communications and connections,⁴¹ and with the kind of receiver which he may desire and the best the company can afford. He may demand that his "calls" at the exchange be properly attended to in the regular order in which they are made; that all calls made for him be promptly and properly looked after; and, above all things, it is the duty of these companies to treat all of their subscribers and patrons with the greatest courtesy and respect, and to attend to all business which they may request respecting the services toward them as subscribers. It is also the duty of these companies to furnish their subscribers with all the necessary instruments and conveniences to be had. Thus, they must furnish their subscribers with directories in which are their names and numbers properly arranged.⁴²

⁴⁰ *Central U. Tel. Co. v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Commercial U. Tel. Co. v. New England Tel., etc., Co.*, 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161n; *Kirby v. West. U. Tel. Co.*, 4 S. Dak. 105, 55 N. W. 759, 30 L. R. A. 612, 46 Am. St. Rep. 765; *Leavell v. West. U. Tel. Co.*, 116 N. Car. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 58 Am. St. Rep. 609, 34 L. R. A. 492; *West. U. Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366; *Gwynn v. Citizens' Tel. Co.*, 69 S. Car. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111.

⁴¹ *Central U. Tel. Co. v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

⁴² In *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 2 Am. Rep. 409, it appeared that the relator, an attorney at law, applied to the local company for a telephone with the usual connections. The instrument was

furnished, together with all the appliances, excepting a directory, the absence of which materially impaired the beneficial use of the telephone. After continued applications, a directory was furnished, but on pay day, the subscriber refused to pay except for the time during which he had been furnished with a directory; the company insisted on full payment. Neither would yield, so the company removed the instrument. Subsequently the relator applied for services, offering to comply with their reasonable regulations, but was refused. He then applied for mandamus to compel the company to render the service. It was held that the mandamus should issue. The court, after reviewing the status of the telephone company and the public character of the obligations they assumed, concluded that the company had "assumed the responsibility of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as such common carrier." That the duty to the relator

§ 247. Same continued—terms.

The rule respecting discrimination of rates of telegraph companies is applicable to telephone companies. That is, telephone companies must have a uniform rate for all subscribers and patrons, where the conditions are the same. The rates to be charged to all who use long distance telephones, or to be charged to their regular subscribers, are generally regulated by statutes. It has been held, therefore, that where statutes prescribe the maximum charges for telephone instruments and services, it is not the taking of private property for public use; nor do they in anywise interfere with the constitutional rights of citizens in private property;⁴³ nor are they an interference with interstate commerce.⁴⁴ And where these statutes prescribe a penalty for a violation of this duty, this is only cumulative; and the company cannot be forced to comply with its requirements by mandamus.⁴⁵ As there are cases where telegraph companies may discriminate in their rates, so, also, there may be conditions, surrounding the particular case, which will entitle telephone companies to make like discriminations. For instance, if the expenses and trouble are greater in one particular message than in another, different charges may be made. Thus, they may make a greater charge to a subscriber who has a single line than to one who is on a double line; and they may charge a country subscriber more than one living near the exchange. While this is not the general practice, there seems to be no reason why the same could not be done, as it is necessarily more expensive and troublesome to keep this line in repair than one within the corporate limits and near the exchange. They may also discrim-

was one growing out of its office as carrier and not out of contract; and that its relations with the relator as to the misunderstanding between them concerning the directory, could not affect the case. See, also, *Delaware v. Delaware, etc., Tel., etc., Co.*, 47 Fed. 633, affirmed 50 Fed. 677; *Central U. Tel. Co. v. Bradbury*, 106 Ind. 1; *Budd v. New York*, 143 U. S. 517, 12 S. Ct. Rep. 468; *People v. Manhattan Gas Light Co.*, 45 Barb. (N. Y.) 136. The telephone company cannot evade this

obligation by alleging that it does not rent telephones, but furnishes such service by means of public stations only. *Central U. Tel. Co. v. State*, 123 Ind. 113, 24 N. E. 215; *Central U. Tel. Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

⁴³ *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 201.

⁴⁴ *Central U. Tel. Co. v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

⁴⁵ *Id.*

inate between day and night patrons for the same reasons as those given in regard to telegraph companies. They cannot discriminate between county subscribers; but if a subscriber in one county desires to talk to a subscriber in another county, they may charge extra for such messages; yet this charge must be the same as that imposed on a non-subscriber for the same kind of message; furthermore, the charges must be the same between subscribers and non-subscribers, in the same county, where the conversation is between a subscriber and a non-subscriber. In other words, where conversations are carried on between two citizens of a county, where one is a non-subscriber, the charges must be the same as those imposed on all other non-subscribers. There may be this apparent exception, however, when the addressee is a subscriber; the company would not be allowed to make an extra charge for the purpose of getting him to the telephone as it would in case he were a non-subscriber, and that, too, whether he was or was not a nonresident. Of course, it is not understood by this that the companies should make diligent search for the party called. Telephone companies cannot discriminate in favor of their employees and against the subscribers or patrons; neither can they grant any privilege in the way of free rates to any of their employees, not enjoyed by the public, unless the same is pertaining to business of the company. Neither can they discriminate in favor of a subscriber who does exclusive or any extra amount of business with them. They must serve all equally and impartially, whatsoever may be the nature of business or whomsoever they may be.

§ 248. Whom to serve—persons conducting legitimate business.

It is the duty of telephone companies to furnish equal facilities and conveniences, impartially to all, irrespective of age, race or habits; and serve all these alike on offering to comply with their reasonable regulations. While it seems that they cannot be forced to furnish their instruments to persons for the purpose of using them for an illegitimate business, yet there is no reason why they may not be compelled to furnish their facilities to parties who carry on an illegitimate business, otherwise than by the operation or use of the company. In other words, telegraph and telephone companies cannot be compelled by mandamus to furnish their facilities to a "bucket

shop" for the purpose of obtaining the market quotations,⁴⁶ or to persons otherwise using them as a means of consummating wagering contracts; yet it is their duty to furnish these people, at their place of business not used for such purposes, with all the facilities and conveniences furnished other persons, and on the same terms, where the same is being used for all conveniences otherwise than such as may pertain to their gambling transactions. Furthermore, should they see fit to furnish their telephones and connections to such persons for the express purpose of carrying out their illegal or gambling contracts, yet they could not be forced to furnish their facilities for such purposes to other like persons: because, as they could not be compelled to furnish their facilities to any person for the purpose of carrying on a business which is not under the protection of the laws, they could not be compelled to furnish to others conducting a similar business, likewise unprotected. Among such, who should claim to be discriminated against in this respect, there would be no ground in law or equity on which to base and contend for the right; there is no principle within the far-reaching vision of jurisprudence so powerful as to compel any one to carry on an illegitimate business, or to assist in lending a helping hand to another for the purpose of doing the same. So, as the law will not compel these companies to furnish their facilities to one person for an illegitimate purpose, it surely will not compel them to furnish one for this kind of a business when the company voluntarily extends its services to another for like purposes.

§ 249. Same continued—other corporations.

These companies may elect as to whether they will receive from and deliver messages to telegraph companies; but if they tender their services to one of these companies, they are bound to receive dispatches from and for all telegraph companies in the usual course of business.⁴⁷ As was very ably observed by Judge Butler on this subject: "While such companies are not required to extend their facil-

⁴⁶ *Bryant v. West, U. Tel. Co.*, 17 Fed. 825; *Metropolitan Grain & Stock Exch. v. Chicago Board of Trade*, 15 Fed. 847.

⁴⁷ *Chesapeake, etc., Tel. Co. v. Balti-*

more, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; *Missouri ex rel. v. Bell Tel. Co.*, 8 Am. & Eng. Corp. Cas. 7; *Delaware, etc., Tel. Co. v. State*, 50 Fed. 677.

ities beyond such reasonable limits as they may prescribe for themselves, they cannot discriminate between individuals or classes which they undertake to serve. As common carriers of merchandise may prescribe the points between which they will carry and the description of goods they will accept, so, doubtless, may carriers of messages limit their business and obligations. If, therefore, the respondent had confined the use of its telephonic facilities to the carriage of personal messages for individuals, excluding those of telegraph companies and others who forward messenger hire, the relator would, probably, have no just ground of complaint."⁴⁸

§ 250. When may refuse to furnish services—abusive language.

Under certain conditions and circumstances, telephone companies may refuse to furnish their telephonic instruments and services to certain persons. As mentioned in the preceding section, they may refuse to furnish them to persons who intend to use them for illegitimate purposes.⁴⁹ And while these companies must deal fairly with their patrons and extend to them all the courtesy and respect which

⁴⁸ *Drue, etc., Tel. Co. v. State*, 50 Fed. 677.

⁴⁹ *Mandamus* does not lie to compel a telephone company to place a telephone in a bawdy-house: *Godwin Tel. Co.*, 136 N. Car. 258, 48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941. The court in this case, said "It is argued that a common carrier would not be authorized to refuse to convey the plaintiff because she keeps a bawdy-house. Nor is the defendant refusing her a telephone on that ground, but because she wishes to place the telephone in a bawdy-house. A common carrier could not be compelled to haul a car used for such purpose. If the plaintiff wished to have the telephone placed in some other house used by her, or even in a house where she resided, but not kept as a bawdy-house, she would not be debarred because she kept another house for such unlawful and disreputable purpose. It is not her char-

acter, but the character of the business at the house where it is sought to have the telephone placed which required the court to refuse the mandamus. In like manner, if a common carrier knew that passage was sought by persons who are traveling for the execution of an indictable offense, or a telegraph company that a message was tendered for a like purpose, both would be justifiable in refusing, and certainly when the plaintiff admits that she is carrying on a criminal business in the house where she seeks to have the telephone placed, the court will not by its mandamus require that facilities of a public nature be furnished to a house used for that business. For like reason a mandamus will not lie to compel a water company to furnish water, or a light company to supply light to a house used for carrying on an illegal business. The courts will enjoin or abate, not aid, a public nuisance."

is due one person toward another in like circumstances yet, on the other hand, they should likewise receive the same treatment by all who desire to do business with them. So, if anyone applying to them for service should use abusive language over the wires, or such as would tend to create a public disturbance either with any employee of the company or other person with whom they may be conversing, they may refuse to furnish him service while using such language. And should one of their subscribers use, continuously, such language or abuse over his telephone, after persistent requests by the company not to do so, they may, as a last resort, remove their instrument from his premises. It is a well-known principle in the law of torts, that any publisher of libelous or slanderous words is as guilty of the wrong as he who first used the words; so, if these companies could be forced to render services to persons who used them for such purposes, the company, and not the wrongdoer in fact, might thereby become liable in an action for damages. So to protect itself such company may refuse services to such persons.⁵⁰

§ 251. Same continued—on refusal to pay charges or rent—other reasons.

The company may refuse to furnish its facilities to any one who does not offer to pay the proper charges.⁵¹ The charges of these companies, as said heretofore, are regulated by state and federal laws, and so long as charges remain within the maximum rates prescribed by these authorities, the companies can enforce a compliance or refuse to render their services. But so soon as they exceed these charges in any manner, as by rental of each of its instruments; or as a rental for their instruments and an extra charge for non-subscribers; or as a toll-station, or a charge for each conversation and a rental, they cannot use this as an excuse for not furnishing their instruments, provided the subscriber or patron offers to pay the rate prescribed by law. If the failure to pay is due to the company's refusal to render the patron the services he is entitled to demand, it affords no ground to the company for discriminating.⁵² And the

⁵⁰ Pugh v. City, etc., Tel. Co., 27 Alb. L. J. 163.

⁵¹ Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113;

Rushville Co-operative Co. v. Irvin, 27 Ind. App. 62.

⁵² Owensboro-Harrison Tel. Co. v. Wisdom, 62 S. W. 529, 23 Ky. L. Rep. 97.

fact that an applicant had violated a former contract with the company is no ground for its refusing his application. Thus, for the reason that a subscriber refused to pay his rental, past due, on the account of a directory not having been furnished at the time by his request, is no ground for the company's refusal to furnish its instruments later and at a different time, when the subscriber agrees to comply with their reasonable rules.⁵³ The company may refuse to furnish facilities to one who violates its reasonable regulations with regard to the use of its instruments,⁵⁴ but the regulations must be entirely reasonable. For instance, a telephone company cannot, as a condition precedent to furnishing an applicant with telephone facilities, require him to stipulate that he will use the system of that company exclusively.⁵⁵

§ 252. Being lessees of patents—no excuse.

It has been vigorously contended in several cases, that telephone companies were not under obligation to furnish services to the entire public or to certain rival companies, where they were the lessees of telephone patent devices; but with only one exception,⁵⁶ all the courts have held that they could not evade this duty on such ground. The manner in which this question was brought about is as follows: One Alexander Graham Bell invented an apparatus for transmitting articulate speech by electricity, and the same was patented by him in 1876 in the United States, by which the exclusive right to use and license others to use, and to refuse to others the right to use said invention, was vested absolutely in said Bell and his assigns; and the whole of said rights of said Bell were by him duly assigned to, and became vested in, the American Bell Telephone Company, a Massachusetts corporation; and after the grant of said letters patent to

⁵³ *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 409; *State v. Kinloch Tel. Co.*, 93 Mo. App. 349; *State v. Citizens' Tel. Co.*, 61 S. Car. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

⁵⁴ *People v. Hudson River Tel. Co.*, 19 Abb. N. Cas. (N. Y.) 466; *Gardner v. Providence Tel. Co.*, 23 R. I. 262.

⁵⁵ *State v. Citizens' Tel. Co.*, 61 S. Car. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139; *Gwynn v. Citizens' Tel. Co.*, 69 S. Car. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111.

⁵⁶ *American, etc., Tel. Co. v. Connecticut Tel. Co.*, 49 Conn. 352.

Bell, other inventors made various improvements in his apparatus, to be used therewith, and all of which have been assigned to the said company.⁵⁷ But before these last patent devices were assigned to said company, a controversy arose as to who were the real inventors of said devices; the result of said controversy was the assignment of all said devices to this company, by which there were certain exclusive privileges to be enjoyed by the assignors.⁵⁸ Later, the American Bell Telephone Company, assignee of all these patented devices, leased these apparatuses to other companies, under the condition that the latter companies would not furnish services to certain rival companies of lessors. These rival companies, after having been refused by these lessees to furnish them with telephone connections and services, applied to the courts to issue a mandate to force and compel such services; and the same was granted on the ground that the condition under which the lease was made, with respect to the uses to which these devices could be put, was void.

§ 253. Lessee's ground for refusal.

It has been strongly urged by the lessees of these patented devices, that by reason of the fact that the American Bell Telephone Company, being the absolute and exclusive owner of such patents; having acquired the right to vend, sell and use them in any manner which it might see proper; and, having leased, under such authority its patents to them, could use them only for such purposes as were prescribed in the lease. In other words, the American Bell Telephone Company was the absolute and exclusive owner of these devices; that it had the right, in granting any license to use these apparatuses, to limit such use by any condition which it saw proper to impose upon the licensee; and that the licensee acquired but a limited right, and could impart no greater right to any subscriber than that possessed by the licensee itself.⁵⁹ It is true that this company has acquired, through Bell the inventor, the absolute ownership of these devices; that it is protected under its patent, in the vending and selling of the patent itself; and it may lease these to any person

⁵⁷ Id.

⁵⁸ *Telegraph Co. v. Telephone, etc.*

Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161n.

⁵⁹ Id.

or corporation it may see proper, or may refuse to make or use or allow anyone else to make or use them; but as soon as the right of the property, in its physical substance, is placed out to any one for public use, it then loses the control over its use.⁶⁰ The owner may lease the devices for private purposes and restrict its uses; but so soon as it is leased for a public use,⁶¹ the public then acquires an interest in the property in its physical nature. It is then subject to the public control as any other property so used; and no discrimination with respect to that use can be exercised. It must be borne in mind that the right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself.⁶² Therefore, as soon as the owner of these patented devices leases them to be used by another company, he may restrict the lessee with respect to the making, selling or leasing of such instruments or devices; but he loses control over the property with respect to the uses to which it may be put.

§ 254. Remedies—mandamus.

The duty which the telephone company owes the public, being established in any case, mandamus is the proper remedy to enforce such performance. They are not under obligation to the public, in every particular, as common carriers, in that they are not insurers of correct transmission of messages; yet their duties toward the government, with respect to acting impartially toward all who apply to them, offering compliance with their reasonable regulations, are the same as common carriers. While the government will not interfere with the internal management of these companies, unless necessity demands it to do so, yet having an interest in the concern to the extent of seeing that their acts toward the public are impartial it may regulate the external management of the company to that extent; and the proper proceeding in all cases of this kind is by a writ of mandamus.⁶³ But if, after the writ has been issued, there is any show-

⁶⁰ *Id.*

⁶¹ *Connell v. West, U. Tel. Co.*, 116 Mo. 34, 20 L. R. A. 172, 38 Am. St. Rep. 575; *Telegraph Co. v. Telephone, etc., Co.*, 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161n.

⁶² *Telegraph Co. v. Telephone, etc., Co.*, 61 Vt. 241, 15 Am. St. Rep. 893, 5 L. R. A. 161n, 17 Atl. 1071.

⁶³ *Owensboro-Harrison Tel. Co. v. Wisdom*, 62 S. W. 529, 23 Ky. L. Rep. 97; *Mahon v. Mich. Tel. Co.*, 93 N.

ing that the company has not had the time to make the arrangements in supplying the facilities, and that they will be furnished within a reasonable time, the writ should be stayed until proper time has been given the company to make such necessary arrangements.⁶⁴ While this, in general, is the proper step to pursue in order to enforce the duties of these companies, it is also the proper procedure to compel the lessee of these patented devices to furnish their instruments to all who apply for services.

§ 255. Proper parties.

In mandamus proceedings, brought to enforce telephone companies leasing these patented devices, to furnish telephone facilities, it is not necessary to make the owners of the patent defendants in the case. The lessee of the patent is the only necessary party defendant.⁶⁵ The reason for holding that the owner of the patent should not be made a party to the suit is, that the conditions of lease with respect to the limitations imposed thereon in the uses to which the tangible property of the patent may be put, are void; and, as the other part of the lease is binding, the owner of the patent has temporarily lost his interest in this property and cannot, therefore, be made a party to a suit concerning property in which he has no tangible interest.⁶⁶ While the owner of the patent need not be made a party to the proceedings, yet the company's defense may be that its contract with the patent company, the owner of the patent, forbids it to furnish the particular service in dispute.⁶⁷

§ 256. By injunction.

While mandamus proceedings are the proper steps to force the owners of these patented devices to furnish their facilities to tele-

W. 629; *State v. Kinloch Tel. Co.*, 93 Mo. App. 349; *People v. Central New York Tel., etc., Co.*, 41 N. Y. App. Div. 17; *State v. Citizens' Tel. Co.*, 61 S. Car. 83, 39 S. E. 257, 5 L. R. A. 139, 85 Am. St. Rep. 870.

⁶⁴ *State v. Citizens' Tel. Co.*, 61 S. Car. 83, 99 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

⁶⁵ *Bell Tel. Co. v. Com.* (Pa.) 3 Atl. 825. Compare *Commercial U. Tel. Co. v. New England Tel., etc., Co.*, 61 Vt. 241, 17 Atl. 1071, 5 L. R. A. 161n, 15 Am. St. Rep. 893. See also *Missouri v. Bell Tel. Co.*, 23 Fed. 539.

⁶⁶ *Id.*

⁶⁷ *Id.*

phone companies where the same have never been furnished, yet should these companies be already supplied with these facilities and about to be deprived of them, a writ of injunction would be the proper procedure.⁶⁸ If the services are wrongfully discontinued, the company would be entitled to recover such damages as were the direct result of the wrong;⁶⁹ and the measure of damages in such case, where there is no willful wrong and the discontinuance is due to an honest mistake on the lessee's part and no special damages are shown, is the price of the service during the time it was discontinued, calculated on the basis of the regular monthly charge.⁷⁰ Special damages are also recoverable when proven.⁷¹

⁶⁸ *Louisville Transfer Co. v. American Dist. Tel. Co.* (Ky.), 24 Alb. L. G. 283. See also *Central Dist., etc., Tel. Co. v. Com.*, 114 Pa. St. 592, 7 Atl. 926. Where, pending the injunction suit, the telephone company sold and transferred its property and rights to another, the suit cannot be continued against the purchaser merely as its successor.

Sterne v. Metropolitan Tel. etc., Co., 33 N. Y. App. Div. 169.

⁶⁹ *Malochee v. Great Southern Tel., etc., Co.*, 49 La. Ann. 1690, 22 So. 922.

⁷⁰ *Cumberland, etc., Tel. Co. v. Hendon*, 71 S. W. 435, 24 Ky. L. Rep. 1271.

⁷¹ *Owensboro-Harrison Tel. Co. v. Wisdom*, 62 S. W. 529, 23 Ky. L. Rep. 97.

CHAPTER XIII.

TRANSMISSION AND DELIVERY OF MESSAGES—GENERAL NATURE OF LIABILITY.

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§ 257. Telegraph Companies.

Telegraph companies have been held, with one exception,¹ to be liable for the incorrect transmission and safe delivery of messages only through the negligence of their servants. While they are not common carriers in the strict sense of the term, in that they are not insurers of a correct transmission of messages, the duty which they owe the public is almost the same. They must serve impartially all who apply to them for services after offering to comply with their reasonable regulations. They must use proper machinery, skilled employees and exercise due diligence in the transmission of messages. So long as this is done, they will not be liable for damages as a result of errors made in the transmission; but so soon as they are guilty of negligence or willful default on the part of their employees, and damages arise thereby, they will be liable. To be excused from liability for such damages, they must show that the incorrect transmission of the message was not caused by any negligence or willful default on their part. In other words, they must show that they exercised the same due care and diligence in the transmission and delivery of the message as would be exercised by a man of ordinary understanding and ability under similar circumstances. The business of these companies has become so great in the commercial

¹ *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589. The rule established in this case has been changed by statute; Civil Code Cal. §§ 2162-2168; West. U. Tel. Co. v. Cook (C. C. A.), 61 Fed. 624.

world that, in order to accomplish the best ends in correctly making these transmissions, they should be held to the strictest accountability in the operation of their work and in the transmission of their messages. While they are not insurers of a correct transmission of messages, yet on account of the importance of their undertaking they should be held to a strict observance of the absolute necessity of care on the part of their servants.

§ 258. Same continued—opinion on point.

Notwithstanding the fact that, in an able opinion, telegraph companies were held to be liable as bailees for hire, yet in this same opinion good reasons were given why such companies should not be held liable as common carriers. It gives us pleasure to quote what the court has to say on this point with respect to their non-liability as common carriers: "There are three classes of cases in which the law has settled the principle, independent of the stipulations in the contract, to govern when alleged injuries have been received by one at the hands of another. These are, first, bailments; second, duties undertaken by one claiming to be skilled in the matter which he undertakes, such as professional employments; and, third, common carriers. As to the two first, the principle is that reasonable and due care and skill, according to the nature and character of the work done or service rendered, is guaranteed, and, in case of injury to be exempt the defendant must show the presence of this care and skill, or, what is the same thing, the absence of negligence and inexcusable carelessness. As to the latter, to-wit, common carriers, the more stringent principle is, that nothing but an act of God or irresistible force, expressed in the books as the public enemies, will exempt. Now in which of these classes shall telegraph companies be placed, or to which have they been regarded as belonging? It is true, the business in which these companies are engaged is quasi-public, but there is a wide difference between them and common carriers, and the foundation upon which the very stringent doctrine of non-exemption, except for an uncontrollable cause, is imposed by the law upon common carriers is altogether wanting as to a telegraph company. There is no motive or opportunity for a telegraph company to make mistakes or commit errors. There is no inducement

or possibility for such companies to appropriate anything which may be intrusted to them, to their own benefit, at the sacrifice of their employers interests. Their business is simply to transmit messages by the medium of that mysterious agent, electricity, which with increasing progress is now being made to contribute so wonderfully and so usefully to our wants. In the discharge of their duties the principle qualifications required are experience, practice, and good faith on the part of their agents and servants, but even with the best qualified employees much depends upon electric, atmospheric, and other subtle influences beyond the reach of experience and the utmost skill. While, therefore, there is reason for holding them responsible for the qualifications necessary for the proper performance of the work which they purpose to do, as the first classes mentioned above are held, to-wit, professional employees and bailees, yet there is no reason for holding them as insurers like common carriers. Common carriers transport goods, merchandise and other corporeal materials, which are constantly in their possession from the commencement of their trip until the destinations are reached, and it is entirely reasonable that they should guard and protect these goods against all dangers which can be warded off by human power. But telegraph companies transmit ideas—intangible and fleeting things—which when placed upon the wire instantly escape from the hands of the operators, and in a moment, yea, in the twinkling of an eye, are hundreds and thousands of miles away, far beyond the reach and control of him who started them upon their distant mission, passing through different parallels of latitude or degrees of longitude, as the case may be, with the rapidity of thought, but encountering for themselves all the dangers or obstacles that may be met by the way. To apply the rule of common carriers to these companies would, it seems to us, be extremely unjust, and to hold them absolutely liable as insurers would greatly impair this mode of correspondence, crippling if not destroying a most important and growing department of business.”²

§ 259. Not liable as ordinary bailees for hire.

It has been held by some courts that the legal status of telegraph companies was that of ordinary bailees for hire, and liable for the in-

² *Pinekney v. Telephone Co.*, 19 S. Tel. Co. v. *Blanchard*, 45 Am. Rep. 487, C. 71, cited in note to case, West. U

correct transmission and delivery of messages as such;³ but as said on this subject under a different head, this is an erroneous idea. There is no doubt but that there exists a similarity between the liabilities of the two; but on account of the position they occupy toward the public, the ground on which the liability arises is different, thereby making the liability itself different. They are not insurers of the property intrusted to their care, and are liable only for negligence in the performance of their trust. To this extent there is a similarity, but for the reason that the public has no interest in an ordinary bailee, the latter may limit its liability by contract, on which its liability solely arises. On the other hand, the public has an interest in telegraph companies, and to that extent it must control. As has been often said, they cannot discriminate, but must act impartially toward all. Their duties are not founded, as ordinary bailees, on contracts altogether, but are derived from the public trust which they occupy. They may limit their liabilities as bailee to a certain extent by reasonable regulations, yet they cannot enforce a regulation by which they may be exonerated for the negligence of their servants. There is no possible way by which they may contract away their liabilities for the negligence in the transmission and delivery of messages. It is a well-known principle of law that an ordinary bailee for hire, because it is not exercising a public duty, may choose with whomsoever it may see fit to do business and may contract in such manner as to relieve it of all responsibilities; but this is not the rule applicable to telegraph companies.⁴

§ 260. Same continued—telegraph and telephone—liabilities—distinctions.

Telegraph and telephone companies occupy a very peculiar position toward the public with respect to their duties in the faithful performance of their mission, and the liabilities arising therefrom for a non-performance of same. They are not strictly common carriers,

³ See note 1.

⁴ *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917; *West. U. Tel. Co. v. Fontaine*, 58 Ga. 433; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Birney*

v. New York, etc., Printing Co., 18 Md. 341, 81 Am. Dec. 607; *Smithson v. United States Telegraph Co.*, 29 Md. 162; *Pinckney v. West. U. Tel. Co.*, 19 S. Car. 71, 45 Am. Rep. 765.

nor are they ordinary bailees for hire, but they have features resembling both of these. In the first place, they must furnish equal facilities impartially to all and herein they resemble common carriers; but they are likened unto bailees in that they are not insurers. In other words, they occupy a kind of middle ground between the two. They may be classed as a species of agency, acting in behalf of both sender and sendee or those conversing as principals, and liable as any other agent occupying a similar position. They are a go-between, or a means by which people in remote sections are brought into almost as close contact with each other, with respect to the communication of thoughts and ideas, as if they were together in person. While the object of these companies are the same—the transmission of intelligence by means of electricity—yet the manner in which the objects are carried out is so varied that the responsibility imposed on each is somewhat different. For the reason that the manner of transmitting news over a telegraph company is manipulated almost entirely by servants, skilled and experienced in such business, the parties communicating doing nothing more than properly preparing and delivering the message to the company, it is under a greater responsibility toward its patrons, than a telephone company which only furnishes the means by which the communicants are brought together. It is true that the latter company must furnish, impartially, the best instruments, facilities, connections and accommodations to all, serve all in the regular time in which they call, and put the applicants in proper connection, so they may be enabled to understand each other while talking. When this is done, the company's responsibilities are at an end. Any misunderstanding of the conversation brought about by the default of the company, which could be imputed as negligence, if the same were made by a telegraph company, should be corrected by the communicants themselves while conversing, with the assistance of the company; should, however, the latter be the cause of the misunderstanding, through its negligence, it should be liable for all damages arising thereby. In other words, for the reason of the fact that those who carry on conversations over telephones enter into and assume some of the burdens connected with the means of transmitting the intelligence, which is otherwise borne exclusively by telegraph companies, they should likewise assume some of the respon-

sibilities, or, rather, relieve the company of some of them. Of course they may under certain conditions be just as liable as telegraph companies, as where the servant of the company as agent for the latter, carries on the conversation for another party.

§ 261. Same continued—telephone.

It is not the duty of telephone companies to deliver messages beyond the termini of their lines, as it is not presumed, at the time the parties are placed in direct communication with each other, that such was the duty of these companies; but, where the agent of the company has the apparent authority to receive messages for delivery, the company will be liable for damages in the negligent performance of the undertaking.⁵ Thus, where it is agreed, through the knowledge of the company, between a party, who pays the charges for transmission and an extra charge for the delivery, and the agent at one of the termini of the company's line that the latter will receive and deliver a message two miles from the office of the company, and the agent negligently delays in delivering same for eight hours after the message is received, and damages arise thereby, the company will be liable.⁶ And it will be no ground for defense that the agent believed that the sendee would not be benefited or would not be enabled to comply with the wishes of the message by an earlier and more prompt delivery of same. It is no duty of the agent to speculate as to the necessity of a prompt delivery of the message, but he should use due diligence in making a prompt delivery.⁷ In order for the sendee to recover damages, under such circumstances, he must prove that he could and would have complied with the apparent wishes of the message.⁸

⁵ In many cases, telephone companies contract to send messages in the nature of telegrams and when such is the case, they are under the same obligations and subject to the same liabilities as telegraph companies, and are bound by the same rules. See notes to *West. U. Tel. Co. v. Cooper*, 10 Am. St. Rep. 778; *West. U. Tel. Co. v. Luck*, 66 Am. St. Rep. 873.

⁶ *Cumberland Tel. Co. v. Brown*, 104 Tenn. 56, 50 L. R. A. 277, 78 Am. St. Rep. 906; *Southwestern, etc., Tel. Co. v. Dale*, 27 S. W. 1050.

⁷ See note 4.

⁸ *Telephone Co. v. Brown*, 104 Tenn. 56, 78 Am. St. Rep. 906, 50 L. R. A. 277.

§ 262. Message for person—make reasonable search.

As said above, it is presumed that parties desiring to converse over telephone lines are put in direct communication with each other, and that it is not under the same duty to deliver the messages as it is for telegraph companies to deliver telegrams, unless it apparently assume the duty; but in order to place the parties in communication with each other it is often necessary to search for the party called. For instance, suppose a call is put in for a certain person, who may or may not be a subscriber, and it is necessary, in order to get the party, to send out and notify him of the call. The question which presents itself is, Is it the duty of the company to send out for the party called? It seems to us that if the party wanted is within a reasonable distance of the company's exchange it is the duty of the latter to make reasonable efforts to reach him; surely it is, if extra charges have been collected for such services. Many times such calls are made for parties who are entire strangers in the town, to which doubtless, there are no other means of reaching him—as by telegram. To say that the company is not under some obligations to the public to make an effort to apprise him of the call would be nothing less than to release it from performing one of its public duties; that is, to furnish equal facilities to all who apply for services, after offering to comply with its reasonable regulations. Although, it is rather difficult, in this instance, to lay down any principle of law, as a standard of measurement, in determining what would be a reasonable distance, within which search should be made, yet each case should be taken and considered somewhat on its own merits. By the construction of an Indiana statute, it has been held that it is the duty of telephone companies, in that state, to notify a person living within a reasonable distance of the receiving station that he is wanted.⁹ It does not seem to us that it is necessary for the existence of such a statute, in order to impose on the company the duty of notifying a person who lives within a reasonable distance of the receiving office; but the question to be decided is, What is a reasonable distance from the receiving office to where the party wanted lives? It is very evident that the company is not under the same obligations it otherwise would be, if extra charges had been collected for performing this

⁹ Central U. Tel. Co. v. Swoveland. 14 Ind. App. 341.

service. So, while it may be seen that this is one of the duties of these companies, yet it is one not to be so closely observed as those for which they are directly compensated.

§ 263. Same continued—when compensated.

The preceding sections have reference particularly to calls made where no extra charges have been collected for delivery. If the company has been compensated additionally for its services in getting the party called to the telephone, it will be under the same obligation to discharge this duty as is imposed on telegraph companies for delivering telegrams, under like circumstances. A greater per cent of the telephone exchanges are in country towns, and the revenues derived from this kind of services are not always sufficient to justify the company in keeping a messenger boy. But wherever, at such places, a call has been put in for a certain party and extra charges have been collected for such services, it is the duty of the company to make a reasonable effort to find the party called, and should some one be engaged or employed by the agent of the company to perform such services, it will be just as liable for the negligence of such person in the discharge of such services, as if he was a permanent employee whose duties were of this particular nature. To hold otherwise, would relieve these companies of one of their public functions, and furnish them a means of avoiding many of their liabilities. So, it will be seen, under such circumstances, that it is not only the duty of the company to exercise a reasonable degree of care in the selection of its messengers, but it must also exercise the same care in seeing that the messenger properly discharged his duty in making a reasonable search for the party called.

§ 264. Long distance telephone—disconnected at intermediate points.

A long distance telephone company, holding itself out to furnish connections beyond the termini of its lines, is under obligations to the public to perform such duty; and, on a failure to secure such connections, through the negligence of its agents, at the terminus of its lines whereby damages are incurred, the company will be liable for such damages.¹⁰ When the company holds itself out to perform such

¹⁰ *Southwestern Tel. Co. v. Taylor*, 26 Tex. Civ. App. 79.

duty, it is incumbent on it to discharge that duty to the best of its ability. In other words, it is part of the contract continuously offered to the public, at all times, and when any applicant accepts the benefits arising therefrom, by compensating the company for such services, the company must carry out its part of the contract, and if a failure to do so is caused by its servants negligently failing to furnish the proper connection with other lines, over which the distant communicant is finally to be reached, and damages arising therefrom, the company will be liable.¹¹

§ 265. Duty of telegraph companies to transmit—arises not on contract alone.

As heretofore said, the duties and obligations of telegraph companies to transmit and deliver messages do not arise altogether from contracts. They are quasi-public corporations, exercising privileges acquired from the state and federal government, which imposes on them a greater duty than could be enjoyed if it were a mere contract made between two individuals. It is true, that they can make reasonable contracts with their patrons whereby they may limit, to a certain extent, their common law liabilities, but they cannot evade their entire duties and obligations which they owe the public by a contract. This would give them too much power by which frauds would be perpetrated and impositions cast upon the public: since it is often the case that these companies are called on to transmit messages of the greatest importance, and in order to accomplish the purposes for which they are sent, they should be transmitted in the most possible haste. When this is the case, the sender has no time to investigate the purport and nature of the contract, and should not be forced, at such a time, to accept any contract which may be held out to him by the company. It is a duty which they owe the government to make prompt and correct transmissions of messages, and it is not necessary that such a duty be imposed on them by the statutes: since it is a common law duty. It is true that the contract for sending

¹¹ *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 31 Am. St. Rep. 59. In this case the defendant was the connecting company over whose lines the message was to reach its destination and it was

held therein that it was under obligations to make a prompt and correct delivery of the telegram, regardless of the contract made with the initial line with the sender.

gives force and effect to the duty which is imposed upon such companies, but the contract alone does not fix the measure of their duties and obligations. This contract must be controlled, to a certain extent, by the public duty; since if there is any material part of the contract in conflict with this public duty, it will be of no force and effect.¹²

§ 266. Same continued—further duties.

Telegraph companies are under a legal duty to accept, transmit and deliver, without error or delay, all proper messages presented, after they have been compensated for such service, and any injury arising proximately out of a failure to perform such duty, will subject them to damages. They are exercising a public employment and must subject themselves to all demands of the government. As public servants, they should be ready and willing to obey any mandate or request of the public. "Their relation to the public imposes upon them the duty of undertaking as well as the duty of performing, and the violation of either duty is a negligence, a tort. It is the equivalent, therefore, of an affirmative interference by a mere private person to hinder or obstruct communication. For one of these companies not to receive or not to transmit and deliver a dispatch when it ought to do so is more than a refusal to contract or than the breach of a contract. It is a wrong as pronounced as would be that of a person who should forcibly exclude another from the telegraph office, and prevent him from handing in a dispatch which he desired to lodge for transmission. In dealing with the wrong as such, the element of contract is not involved."¹³

§ 267. Same continued—must accept proper messages—not improper or such as would subject the company to indictment.

The first duty of these companies is to accept all proper messages presented to them for transmission, after a payment has been made,

¹² *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 231; *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864; *West*

U. Tel. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715.

¹³ *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 27 Am. St. Rep. 260, 14 L. R. A. 95, 13 S. E. 562.

or an offer to pay a reasonable sum for such services. While this is the general rule, yet there may be instances when these companies may refuse to accept messages for transmission.¹⁴ Thus they may refuse to accept a message for transmission, which clearly shows on its face matters which would subject them to a criminal prosecution. No person is under any legal duty, or can be compelled by law to commit, foster or aid in the commission of a crime. The laws were enacted and are enforced to accomplish the direct opposite results. Telegraph companies are but persons in the eye of the law, enjoying certain privileges and immunities as such and for the reason that their rights and duties toward the government are somewhat different from that of individuals, is no reason why they should be under any obligation to the public to do an act which would make them liable criminally. It follows, therefore, that they are under no obligations, or can be forced, to accept a message for transmission which would have the tendency of subjecting them to a criminal prosecution, either as a principal or an accessory. To relieve the company however of this duty, it must clearly appear on the face of the message that it would subject it to an indictment, and every doubt should be construed in favor of the message. The moral effect of the telegram would not be for their consideration, and yet, they may refuse to accept any message which shows any indecency or profanity on its face. In many instances, the messages presented to the company are written in such a style or in such a manner as that it would not be apprised of their meaning or purport—and among which there may be some which are very immoral; yet, the company, not being able to ascertain the meaning of these on their face, it being presumed that the operators could not read the minds and consciences of the sender—should not, therefore, be held liable for their moral effect.¹⁵

§ 268. Same continued—such as would subject to action of tort.

So, for the same reasons, a telegraph company is not under obligations to any one to accept a message for transmission, which would lay it liable to an action of tort. While they may and do commit torts in many and various ways, yet they cannot be forced to do any act

¹⁴ *Alexander v. West, U. Tel. Co.*, 66 Miss. 161, 5 So. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71.

¹⁵ *Gray v. West, U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 14 L. R. A. 95, 27 Am. St. Rep. 260; *Smith v. West, U. Tel. Co.*, 84 Ky. 664.

which would make them liable for one.¹⁶ "Doubtless," as was said on this subject, "a dispatch to be entitled to transmission must be free from open indecency or profanity, and perhaps other vices of language might condemn it; but supposing it to be proper in tone and expression, we should say that the companies would have no concern with its import unless it sought to subserve either crime or tort. If it disclosed either of these objects, it seems to us that the company, for its protection, might and should refuse to handle it. It would be unreasonable to suppose that the legislature intended telegraph companies to aid in the perpetration of crimes or actionable wrongs, for this would be to constrain them to do by legislative mandate what they would have no right to do by their own choice."¹⁷

§ 269. Same continued—lines down—other reasons.

If the company's lines are down, or for any other reason it cannot transmit the messages, it may decline to accept same; but if the company accepts the message, knowing these facts, without informing the sender, it will be liable for a failure to transmit, although the transmission was impossible.¹⁸ Thus, where the company's agent receives the message to be transmitted to a certain place, it will be liable for a failure to transmit, even though the company has no office at this place, which fact the agent did not know until after the message had been received. But for the reason that the name of the station is not entered in the official guide book, is no reason for refusing to receive a message for that place.¹⁹ It is presumed that the agent knows or has a means of knowing all the stations of the company.²⁰ In fact, this is the reason why these companies should be required to keep an official guide book, and if the name of the station is not entered or is incorrectly entered therein, this negligence itself would make the company liable. It seems that it would not only be liable for a failure to transmit to a station on its line, not entered on the official guide book, but to any other place on any other line not

¹⁶ *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 14 L. R. A. 95, 27 Am. St. Rep. 260, 13 S. E. 562.

¹⁷ *Id.*

¹⁸ *West. U. Tel. Co. v. Birge-Forbes*

Co., 29 Tex. Civ. App. 526, 69 S. W. 181.

¹⁹ *West. U. Tel. Co. v. Downs*, 25 Tex. Civ. App. 597, 62 S. W. 1078.

²⁰ *West. U. Tel. Co. v. Jones*, 69 Miss. 658, 13 So. 471, 30 Am. St. Rep. 579.

officially entered in this guide book, but to a place it could reach. In such a case the company would be liable as in the nature of an agent for the company on whose line the place was located, and by whose negligence, the name of the station had been omitted. In the last cited case it would not be good reason to hold either the receiving company, or the connecting company over whose line the message was to finally reach its destination, liable for a failure to transmit, where the latter company's lines were down, which fact was not known by the first company but was known by the latter.

§ 270. Must be properly tendered—in writing.

No duty or liability on the part of a telegraph company, with respect to the transmission of a message arises until it has been properly tendered at the company's office for transmission. It must be in conformity to the reasonable rules and regulations of the company. One of the rules of the company, and one to be complied with in order to constitute proper tender, is that the message must be in writing. "It is common knowledge," as was said by Judge Cambell, "that messages are required to be written, and upon the blanks of the company, and it would be hazardous to pursue any other course."²¹ He further said: "In the absence of satisfactory evidence of a known course of business by the telegraph company to receive verbal messages orally delivered to operators for transmission, we are not willing to sanction the proposition that failure to transmit such a message is a ground for recovery against the company, either by statute or common law."²² When it is the rule, that the messages shall be in writing, unless it has been the custom of the company to receive them orally, it is not necessary that they should be in any particular language or in any peculiar style, provided the operator of the company understands the language or style. In other words, it is not necessary that they know the meaning of the message, provided they have the knowledge of what to send, and how.

§ 271. Same continued—must be on company's blank.

Another regulation of the company, and one which is generally held to be reasonable, is, that the message shall be written on one of

²¹ West. U. Tel. Co. v. Dozier, 7 So. 325. ²² Id.

the company's blank forms. Mere delivery of a message, written on a leaf torn from a blank book, without any word spoken either by the plaintiff's messenger or the company's operator concerning the sending of the message, and an absence of any payment made, or tendered, of the price for transmission, is insufficient to create a liability against the company for failing to send such message.²³ But if the message is received by the company and paid for by the sender, the company is bound to transmit it, although it is written on paper other than its usual blanks.²⁴ A presumption of delivery for transmission arises from the receipt of a message written on one of the company's blanks.²⁵ But the fact that the message was not on one of the company's regular blanks, nor in writing at all, but was merely telephoned to the operator, will not affect the company's liability where the negligence complained of is a failure to deliver after transmission. The rule that the company's forms shall be used is a reasonable one, for it contains that part of the company's contract which must be accepted and agreed to by the sender; and to compel it to accept messages on other paper would deprive it of some of the privileges and immunities it could otherwise claim. It is true that the courts have held that some of these stipulations were of no force and effect, but this is no reason why such companies may not relieve themselves from liabilities by those which are reasonable. These companies are entitled to the protection of the laws, and this rule will protect them in many instances and should be enforced. The message must be made out on the blank form and signed either by the sender or his agent in order to hold him liable for the stipulation therein. For, if an agent of the telegraph company receives a message for transmission, written on a plain piece of paper, and attaches it to one of such blanks without calling the attention of the sender to the regulations printed thereon, he acts as agent for the company alone, and the sender is not bound by such regulations; but he may recover for the negligence of the company in the transmission of the message.²⁶

²³ *West. U. Tel. Co. v. Liddell*, 8 So. 510. See note to *West. U. Tel. Co. v. Blanchard*, 45 Am. Rep. 490.

²⁴ *West. U. Tel. Co. v. Jones*, 69 Miss. 658, 13 So. 471, 30 Am. St. Rep. 579.

²⁵ *West. U. Tel. Co. v. Russel*, 31 S. W. 698.

²⁶ *Harris v. West. U. Tel. Co.*, 121 Ala. 519, 25 So. 910, 77 Am. St. Rep. 70.

§ 272. Delivery to messenger boy—not delivery to company.

A delivery of a message to one of the company's messenger boys, written on one of its blanks, is not a delivery to the company unless it has been accepted by the latter at one of the transmitting offices. It is very often the case, that a message is written out on one of the company's blanks, and given to one of the messenger boys by the sender with the request that he deliver it to the company for transmission; notwithstanding the fact that this may be the usual way the sender has of delivering messages for transmission, yet, a delivery to the company in such a manner would not be a proper delivery to it. The reason, assigned for the soundness of this rule, is, that on nearly if not all of these blanks there is a stipulation to the effect, that when messages are delivered to the messenger boy, he shall be considered the agent of the sender and not that of the company in that particular business, and when the sender signs the message he should be bound by this stipulation. It is a reasonable regulation; since, in some cases, the operator of the company may have reasons for not accepting a message for transmission and of which the messenger would have no knowledge. It is well known that the messengers are usually young and inexperienced boys, and of course are not familiar with the rules in regard to the proper messages to be accepted for transmission. It follows, therefore, that if a delivery to a messenger should be considered a delivery to the company, the latter would be liable for failure to send a message delivered to its messenger, although to do so would subject the company to an indictment or to an actionable wrong.²⁷ If, however, the message has been delivered to one of the transmitting offices of the company, and it is a proper message for transmission, it is then a delivery to the company.²⁸

§ 273. Same continued—prepayment of charges before accepting.

Although telegraph companies are exercising a public function and must, therefore, serve all impartially who apply to them, yet, for this reason, it is not presumed that these companies can be forced to accept a message for transmission without first being paid a reason-

²⁷ *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 41 Am. St. Rep. 95, 18 S. E. 1008.

²⁸ *Ayers v. West. U. Tel. Co.*, 65 N. Y. App. Div. 149.

able compensation for its transmission, or a tender made for same.²⁹ The fixed rates for the transmission and delivery having been paid, or an offer having been made in legal tender, it is then a sufficient delivery to the company for acceptance. The company may refuse to accept a message until this requirement has been performed; but, if the agent has accepted one for transmission without prepayment, the company cannot escape liability for delay, by evidence that its rule required prepayment, in the absence of a showing that the sender knew of such a rule.³⁰ Of course there may be exceptions to this rule, as, for instance, where a message is presented to a company with the instruction of the sender to collect the charges from the party to whom the message is addressed. It is then the duty of the company to accept the message, if it has reasonable grounds to believe that the sendee will pay for its transmission.

§ 274. Same continued—failure to receive—damages—functions.

When a telegraph company wilfully refuses to accept a proper message from any one who has complied with all the reasonable conditions demanded by the company, it will be liable for exemplary damages, although it will not be liable for such damages, where its refusal to transmit arises from a misunderstanding as to the nature and meaning of the message.³¹ Thus, where a company refuses to accept a message for transmission because it had reasons to believe that it was intended to promote an illegal purpose, but in which it was mistaken: the court held that it was liable in damages, but could not be held liable for exemplary or punitive damages.³² Where a message is properly prepared and presented and the company then refuses to accept it, the sender may enforce the acceptance by mandamus proceedings.³³

§ 275. Transmit without delay.

The next duty of a telegraph company, after accepting a message, is to transmit it without unnecessary delay; ³⁴ and, on the failure to

²⁹ West. U. Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

³⁰ West. U. Tel. Co. v. Cunningham, 14 So. 579.

³¹ West. U. Tel. Co. v. Ferguson, 57 Ind. 495.

³² Id.

³³ Friedman v. Gold, etc., Tel. Co., 32 Hun (N. Y.) 4.

³⁴ A company will not be liable for failure to transmit a message where there is no Internal Revenue Stamp affixed thereto as required by law. West. U. Tel. Co. v. Young, 36 So. 374.

do so, the company will be liable to any one who may be damaged thereby.³⁵ One of the fundamental reasons why the business of these companies has become so great, and that which induces the public to resort to them is, that it is a means by which the business of the greatest importance may be accomplished in the shortest possible time. This being the case, these companies, by implication, necessarily hold themselves out to the public to use all diligence in the transmission of all messages intrusted to them. This does not mean however an immediate transmission at all times. If it is not within the power of the company to make an immediate transmission, as where it is prevented from making such by the public enemy or by the act of God, it would not be liable for any injury caused by the delay in the transmission. So, also, if the delay has been caused by the company transmitting the message, without negligence, in a circuitous route,³⁶ where the same could be sent direct, on the account of the arrangement of its offices, it would not be liable.³⁷ And if it be necessary to send the message through a repeating office, sufficient time must be given for other business at that office;³⁸ but if the business is such at the repeating office, or at any other office, as to require more than one operator, and only one being in charge of such office, the company would be liable for a delay caused thereby.³⁹ If the delay has been caused by any undue advantage of the company over the sender, it will not be relieved from any injuries arising di-

³⁵ *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 So. 579; *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 404; *West. U. Tel. Co. v. Jobe*, 6 Texas Civ. App. 403. It is liable for such damage as is the direct and natural result of its failure to deliver a message intrusted to it for transmission: *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 772. It is said that a person injured by the delay in delivering a message to him is not limited in his recovery to such damages as might reasonably might have been within the contemplation of the parties, but recovery may be had for all the injurious results which flow therefrom by ordinary natural sequence:

McPeck v. West. U. Tel. Co., 107 Iowa 356, 78 N. W. 83, 43 L. R. A. 214, 70 Am. St. Rep. 205; *Johnson v. West. U. Tel. Co.*, 79 Miss. 58, 89 Am. St. Rep. 584, 29 So. 787.

³⁶ *Leavell v. West. U. Tel. Co.*, 116 N. Car. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. Rep. 798; *West. U. Tel. Co. v. Jones*, 69 Miss. 658, 13 So. 471, 30 Am. St. Rep. 579; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 155, 7 So. 419.

³⁷ *Beasley v. West. U. Tel. Co.*, 39 Fed. 181.

³⁸ *Behm v. West. U. Tel. Co.*, 8 Bliss (U. S.) 131.

³⁹ *West. U. Tel. Co. v. Circle*, 10 Am. & Eng. Corp. Cas. 610.

rectly therefrom. As where the sender's consent to a delay, under a misapprehension induced by the company's agent, creates no estoppel on his part.⁴⁰

§ 276. Burden of evidence—delay—presumption.

When an action is being maintained for an injury caused by a delay in the transmission of a message, the burden of proof is on the company to show that the delay was not caused by its negligence.⁴¹ It would be an unreasonable rule of evidence, to compel the sender to furnish such proof, since, to do so, would be nothing less than to deprive him of his redress for injuries arising from such causes. The transmission of the message is within the exclusive control of the company's servants, and if any of these should be guilty of negligence, it would generally be committed beyond the reach of the sender, but within the knowledge of the company. This being the case, it is better for the burden of proof to be on the company, when it may exonerate itself for the negligent act, rather than to impose such proof on the sender. In some instances, a delay in the transmission of messages will be presumed to have been caused by the company's negligence. Thus, a delay of ten or twelve hours in transmission, if unexplained, will create a presumption of negligence on the part of the company,⁴² and a delay of very much less time may, under peculiar circumstances, raise the presumption of negligence;⁴³ yet the company may overcome this presumption by competent evidence.⁴⁴

§ 277. Duty to inform sender when delay unavoidable.

When a telegraph company, for any cause, cannot transmit a message, or when it will be unavoidably delayed, it is the duty of its

⁴⁰ West. U. Tel. Co. v. Seffel, 71 S. W. 616, 65 S. W. 897.

⁴¹ West. U. Tel. Co. v. Circle, 10 Am. & Eng. Corp. Cas. 610; Pope v. West. U. Tel. Co., 9 Ill. App. 587; West. U. Tel. Co. v. Cooper, 71 Tex. 507, 10 Am. St. Rep. 772, 1 L. R. A. 728.

⁴² Kendall v. West. U. Tel. Co., 56 Mo. App. 192; West. U. Tel. Co. v. Clark, 25 S. W. 990.

⁴³ Postal Tel. Co. v. Rhett, 33 So.

412; 35 So. 829; West. U. Tel. Co. v. Boots, 10 Tex. Civ. App. 540. A delay of three days in the delivery of a telegram has been held to be prima facie evidence of negligence on the part of the company: Harkness v. West. U. Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672.

⁴⁴ Smith v. West. U. Tel. Co., 57 Mo. App. 259.

agent, in all cases, to inform the sender of such fact; especially when the message shows on the face its importance; when these facts are within the knowledge of the agent, or such as he ought to know, and he fails to give such information, this will be evidence of negligence, although it may not be negligence *per se*.⁴⁵ Mitchell, C. J., in discussing this subject, said: "It might well be that in a case when a message was delivered, which showed upon its face the importance of speedy transmission, and other means of making the communication were unavoidable to the sender, which might be resorted to, if he was informed that the one chosen was ineffectual, or his conduct might otherwise be materially controlled thereby, the company would be bound at its peril to ascertain and disclose its inability to serve him, or render itself liable to respond in damages."⁴⁶ It may not be negligence within itself in failing to inform the sender of the unavoidable delay in transmission, but it would be unquestionably evidence of negligence. "In many instances, by such a course, the damage would be greatly lessened, if not entirely avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event the sender might be relieved from great anxiety, and would know what to expect. Moreover, it would tend to show diligence on the part of the company."⁴⁷

§ 278. Must transmit without error.

After a telegraph company has accepted a message to be sent over its wires, it must exercise due and proper care to transmit it in the exact words in which it was delivered.⁴⁸ They are not common car-

⁴⁵ *Fleischer v. Pac. Postal Tel. Cable Co.*, 55 Fed. 738; *West. U. Tel. Co. v. Cohen*, 73 Ga. 522; *Bierhans v. West. U. Tel. Co.*, 8 Ind. 246; *West. U. Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *West. U. Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526. Compare *Ohio R., etc., Co. v. Applewhite*, 52 Ind. 540; *Pittsburg, etc., R. Co. v. Nuzzum*, 50 Ind. 141, 19 Am. Rep. 703; *Landis v. West. U. Tel. Co.*, 126 N.

Car. 431, 78 Am. St. Rep. 668, 35 S. E. 810.

⁴⁶ *West. U. Tel. Co. v. Harding*, 10 Am. & Eng. Corp. Cas. 617.

⁴⁷ *Hendricks v. West. U. Tel. Co.*, 126 N. Car. 394, 78 Am. St. Rep. 658, 35 S. E. 810.

⁴⁸ *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363, and this irrespective of the question of punctuality in their delivery: *West. U. Tel. Co. v. Roundtree*, 92 Ga.

riers and are not, therefore, insurers of a correct transmission of messages, but, as they have assumed public functions and solicited public trade, proper care, under the circumstances, must be exercised in carrying on their business. The value of a message depends upon its correctness. If it is changed in any material part, it is not the same message as that delivered for transmission, and may materially affect the rights of both the person sending and the person receiving it.⁴⁹ Oftentimes messages sent by telegrams are of the most important class of news, and are prepared in the briefest manner; the slightest change or error made by the company, might likely incur serious injury or loss. It is a further fact that the transmission of these messages is intrusted to the exclusive control of the servants of the company—the sender doing nothing more than preparing the message for transmission. The companies for these reasons should prepare themselves with the best material for such business, and have the most suitable, skilled and competent men to manage and operate their machinery. Telegraph companies are often confronted with many uncontrollable hindrances: as, where the wires are exposed to the inference of strangers; a surcharge of electricity in the atmosphere; or a failure or an irregularity in the electrical current, may stop communication: and, they are also subject to danger from accident, malice and climatic influences.⁵⁰ In the early state of their existence, they were more often interfered with by these hindrances, but many of these by degrees have been overcome by improvements in their machinery. We can look back but a few years and marvel at the vast improvements which have been injected into this line of business, and no one can imagine what a few years in the future will bring about. It will be but a question of time when these companies will have made such vast improvements on their instruments, as will enable them to overcome a greater part of these

611, 18 S. E. 979, 44 Am. St. Rep. 93; West. U. Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Pegram v. West. U. Tel. Co., 100 N. Car. 28, 6 S. E. 770, 6 Am. St. Rep. 557. See extended notes to West. U. Tel. Co. v. Blanchard, 45 Am. Rep. 496; West. U. Tel. Co. v. Cooper, 10 Am. St. Rep. 784; West. U. Tel. Co. v.

Hyer, 1 Am. St. Rep. 229; and, Postal Tel. Cable Co. v. Lathrop, 181 Ill. 575, 19 Am. St. Rep. 55, 7 L. R. A. 474, 54 N. E. 1058.

⁴⁹ Kemp v. West. U. Tel. Co., 28 Neb. 661, 26 Am. St. Rep. 363, 44 N. W. 1064.

⁵⁰ Smith v. West. U. Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

hindrances, and, when the time should come, they should be held as insurers of an accurate and correct transmission of messages.

§ 279. Degree of care in transmission.

While telegraph companies are not held liable as insurers; yet, on the account of the importance and magnitude of the business intrusted to their care, the very greatest degree of care and accuracy should be imposed upon them. It is not understood, however, that this would impose a liability upon the company for want of skill or knowledge not reasonably attainable in the art. Nor for errors or imperfections which arise from causes not within their control, or which are not capable of being guarded against.⁵¹ The degree of care which is imposed on these companies in this respect is very ably discussed by the court of Maine which will be found in the note.⁵² The same degree of care is required over connecting lines as over the receiving company's lines.⁵³

⁵¹ *White v. West. U. Tel. Co.*, 14 Fed. 710.

⁵² *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. St. Rep. 447, in which the court said: "To require a degree of care and skill commensurate with the importance of the trust imposed, is in accordance with the principles of law applicable to all undertakings of whatever kind, whether professional, mechanical, or that of the common laborer. There is no reason why the business of sending messages by telegraph should be made an exception to the general rule. This requires skill as well as care. If the work is difficult, greater skill is required. It is often necessary to intrust to this mode of communication matters of great moment, and therefore the law requires great care. It is necessary to use instruments of somewhat delicate nature and accurate adjustment, and therefore they must be so made as to be reasonably sufficient for the purpose. The company, holding itself out to the public as ready and willing to

transmit messages by this means, pledges to that public the use of instruments proper for the purpose, and that degree of skill and care adequate to accomplish the object proposed. In case of failure in any of these respects, the company would undoubtedly be liable for the damages resulting. This would not impose any liability for want of skill or knowledge not reasonably attainable in the present state of the art, nor for errors resulting from the peculiar and unknown condition of the atmosphere, or any agency from whatever source, which the degree of skill and care spoken of is insufficient to guard against or avoid."

⁵³ *White v. West. U. Tel. Co.*, 14 Fed. 710; *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59. Compare *Falvey v. Georgia R.*, 76 Ga. 597, 2 Am. St. Rep. 58; *I. C. R. Co. v. Frankenburg*, 54 Ill. 88, 5 Am. Rep. 92; *McCarty v. Gulf, etc. R. Co.*, 79 Tex. 33; and notes to *Wells v. Thomas*, 72 Am. Dec. 230; *Lawrence v. Winona, etc., R. Co.*, 2 Am. Rep.

§ 280. Liability under statutes—all mistakes.

In some states, there are statutes which provide that telegraph companies are liable for all mistakes and errors made in the transmission of messages.⁵⁴ While regulations made in accordance with these statutes, are held to be reasonable,⁵⁵ it is claimed that they are not liable for such mistakes or errors which are caused by some act not within the control of the company. They are only liable for the negligent acts of their servants and not for any other. A statute providing that these companies shall transmit and deliver messages with "due diligence," and prescribing a penalty for failure to comply with the terms of the statute, relates to the time within which messages must be transmitted and delivered, and not to the accuracy and correctness in sending and transmitting them.⁵⁶

§ 281. Same continued—damages—actual—errors in transmission.

There is a distinction to be drawn, as may be seen, between errors made in the transmission of a message, and delays made in the delivery of same, wherein the penalty can only be inflicted on a failure to promptly deliver the message. These statutory provisions, have no effect whatever on errors made in the transmission; where such errors are made, the injured party is entitled to all actual damages arising thereby, irrespective of the question of punctuality in their delivery.⁵⁷ There must, however, be actual damages caused by the error in the transmission, otherwise, a recovery could not be had. Thus, if through a mistake in the transmission of a telegram, the owner of property is induced to sell it for its then market value, he suffers no damage and cannot recover any; although, when the property subsequently advanced in value, he purchased a part thereof at the advanced rate;⁵⁸ and again, if a broker is directed by telegraph

141; *Gray v. Jackson*, 12 Am. Rep. 40; *Hill v. Syracuse, etc., R. Co.*, 29 Am. Rep. 166; *Nashville, etc., R. Co. v. Spraybury*, 35 Am. Rep. 708; *Hadd v. United States Express Co.*, 36 Am. Rep. 761; *Louisville, etc., R. Co. v. Weaver*, 42 Am. Rep. 664.

⁵⁴ *Kemp v. West. U. Tel. Co.*, 28 Neb.

661, 26 Am. St. Rep. 363, 44 N. W. 1064.

⁵⁵ *West. U. Tel. Co. v. Roundtree*, 92 Ga. 611, 44 Am. St. Rep. 93, 18 S. E. 979.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Pepper v. Telegraph Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10

to sell cotton for the sender of the message on the latter's account, at a designated price, and the company makes a mistake in sending the telegram, whereby the sender contracts to sell for a less price, the latter is under no obligation to deliver the cotton, but, if he does so, constrained by a desire to maintain his business credit, or other reasons, he cannot recover from the telegraph company, for his payment of the loss is purely voluntary and gratuitous.⁵⁹

§ 282. Duty to deliver—addressee—in general.

Subject to reasonable regulations, as to delivery limits, telegraph companies are bound to deliver all messages sufficiently addressed, when this can be done by the exercise of reasonable diligence.⁶⁰ It is seldom these companies are resorted to for the purpose of transmitting news unless the same pertains to business of the greatest importance, and necessarily to be accomplished in the shortest possible time; since, if it were otherwise, the postal system, which is of much less expense and in which there is a greater reliance of secrecy, would be used as the means of accomplishing this purpose.⁶¹ It is just as great a duty and is just as binding on a telegraph company to use due diligence in delivering a telegram to the addressee, or one in whose care it is directed, as that to be exercised in its transmis-

Am. St. Rep. 699; *Persall v. West. U. Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662; *West. U. Tel. Co. v. Stevenson*, 128 Pa. St. 442, 18 Atl. 441, 5 L. R. A. 515, 15 Am. St. Rep. 687; *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *West. U. Tel. Co. v. Edsall*, 74 Tex. 329, 15 Am. St. Rep. 833; *Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 5 So. 397, 3 L. R. A. 71, 14 Am. St. Rep. 556; *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *West. U. Tel. Co. v. Roundtree*, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93; *Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 18 So. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604; *West. U. Tel. Co. v. Beals*, 56 Neb. 115, 76 N.

W. 903, 71 Am. St. Rep. 682; *West U. Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; *Hughes v. West. U. Tel. Co.*, 114 N. Car. 70, 41 Am. St. Rep. 782, 19 S. E. 100.

⁵⁹ *Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 18 So. 425, 44 Am. St. Rep. 93, 30 L. R. A. 660.

⁶⁰ *West. U. Tel. Co. v. Gougar*, 84 Ind. 176; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772, 1 L. R. A. 728; *Pope v. West. U. Tel. Co.*, 9 Ill. App. 587; *West. U. Tel. Co. v. Lindley*, 62 Ind. 371.

⁶¹ *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844.

sion;⁶² since, a mere transmission from one station to another would avail nothing. It is part of the contract whereby the company has undertaken to transmit the messages and therefore just as essential as that of the transmission itself;⁶³ since, a failure of the company to comply with this part of the contract, would bring about the same results, as even a complete failure to transmit the message.⁶⁴ To perform this part of their duty, they must keep a sufficient number of messenger boys at their stations to make such deliveries, and, they cannot escape this duty by showing that the business of the office at the receiving station was not sufficient to justify the employment of an additional agent to make delivery.⁶⁵

§ 283. Excuse for non-delivery.

There are few instances where telegraph companies are excused for not making a prompt delivery, since it is presumed that, when they accept a message for transmission, it is within their power to carry out the obligations of their contracts to promptly deliver. There may, however, be some instances, where they are excusable for not making a prompt or even for making any delivery at all. For instance, where the address of the sendee is not sufficiently given in that his name is not correctly written or his street number is improperly given, or, where the charges for transmission are not given or tendered either by the sender or sendee, or, when the message is transmitted at a time, as at night, when the receiving office has no messenger boy—and it is not the usual custom to have one at that time, in this latter case, however, the message should be delivered early the next morning. Where the sendee is quarantined, on account of some contagious disease, or, where he cannot be found after diligent inquiry for his whereabouts, or, where he lives unreasonably far beyond the free delivery limits and the charges for such delivery have not been prepaid, the company would be excused for a non-delivery.

⁶² West. U. Tel. Co. v. Moore, 12 Ind. App. 136, 54 Am. St. Rep. 575.

⁶³ West. U. Tel. Co. v. Gouger, 84 Ind. 176; West. U. Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844.

⁶⁴ Hendricks v. West. U. Tel. Co., 126 N. Car. 304, 78 Am. St. Rep. 658, 35 S. E. 543.

⁶⁵ West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148. Compare Behm v. West. U. Tel. Co., 8 Biss. (U. S.) 131.

§ 284. Same continued—not excused for.

A telegraph company cannot be excused for liabilities caused by a delay in delivering a message by proof that it was not the custom of the physician, the sendee, to make professional calls at a distance without prepayment or guaranteed payment of his charges;⁶⁶ or, that the message relates to a sale of "futures," unless it is made a crime or tort to speculate in "futures;" or, would subject the company to indictment or civil action to receive and transmit a message in relation thereto;⁶⁷ or, that the contract for its transmission and delivery was entered into on Sunday, if the emergency to which the telegram related was the death and burial of the father of the person to whom it was addressed.⁶⁸ A stipulation on the company's blank, requiring messages to be repeated, is no defense to an action brought to recover damages for a delay; or, for failure in delivering a message, where the same has not been repeated;⁶⁹ nor, does a regulation requiring the prepayment of special delivery charges before transmission, for a telegram to be delivered beyond free delivery limits, excuse delay in delivery or non-delivery of a telegram, unless the sender knows, or is informed that the residence of the sendee is beyond the free delivery limits, and of the amount of the special delivery charges.⁷⁰ A telegraph company will not be excused for non-delivery on the ground that the sender did not inform the operator of its importance, when they fail to show that, if the operator had received such information, he would have changed the method of the transmission, or the time in which it would have been sent, the agency employed, the price demanded therefor, or the skill used in the transmission;⁷¹ nor, will it be excused on the ground, that the busi-

⁶⁶ West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

⁶⁷ Gray v. West. U. Tel. Co., 87 Ga. 350, 13 S. E. 562, 14 L. R. A. 95, 27 Am. St. Rep. 259; Smith v. West. U. Tel. Co., 84 Ky. 664, 2 S. W. 883.

⁶⁸ West. U. Tel. Co. v. Wilson, 93

Ala. 32, 30 Am. St. Rep. 23, 9 So. 414.

⁶⁹ West. U. Tel. Co. v. Broische, 72 Tex. 654, 13 Am. St. Rep. 843.

⁷⁰ West. U. Tel. Co. v. Moore, 12 Ind. App. 136, 54 Am. St. Rep. 515.

⁷¹ Hendricks v. West. U. Tel. Co., 126 N. Car. 304, 35 S. E. 543, 78 Am. St.

ness of the office where it was received was not sufficient to justify the employment of a messenger.⁷² They cannot be excused for a delay by contending that the sender should have sent the message sooner, instead of waiting until the last moment;⁷³ nor by setting up the fact that the message as offered was not in writing.⁷⁴

§ 285. Duty to inform sender of non-delivery.

As a general rule, it is not the duty of the telegraph company to inform the sender that the telegram cannot be delivered, or the sendee cannot be found,⁷⁵ but when it is convenient or practical for the company to impart such information, especially where the message shows on its face its importance, it should do so; otherwise, the company will be liable for all damages directly arising therefrom. Thus, where a mother telegraphs to a friend to meet the remains of her child at a certain place, and she has been assured of the fact that the same was delivered, but in fact it had not been, and the company could have easily informed her of the non-delivery, it will be liable for all damages caused by her accompanying the remains to this place by railroad without giving her an opportunity of making other arrangements.⁷⁶ It is not negligence *per se* to fail to disclose such information to the sender, but it is an evidence of negligence.⁷⁷

§ 286. To whom made—delivery.

After a telegraph company has accepted and transmitted a message, it is under prima facie obligations to deliver the message to the sendee⁷⁸ in person, unless other arrangements have been made, and; it

Rep. 658; West. U. Tel. Co. v. Hyde Bros., 16 Am. & Eng. Corp. Cas. 232.

⁷² West. U. Tel. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 9 So. 414.

⁷³ Pope v. West. U. Tel. Co., 14 Ill. App. 531; West. U. Tel. Co. v. Bruner, 19 S. W. 149.

⁷⁴ West. U. Tel. Co. v. Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23.

⁷⁵ West. U. Tel. Co. v. Davis, 51 S. W. 258.

⁷⁶ Hendricks v. West. U. Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; Landie v. West. U. Tel. Co., 126 N. C. 431, 78 Am. St. Rep. 658, 35 S. E. 810.

⁷⁷ Id.

⁷⁸ West. U. Tel. Co. v. Mitchell, 91 Tex. 454, 44 S. W. 274, 40 L. R. A. 209, 66 Am. St. Rep. 906; West. U. Tel. Co. v. Moseley, 28 Tex. Civ. App. 562, 67 S. W. 1059; West. U. Tel. Co. v. DeJarles, 8 Tex. Civ. App. 109, 27 S. W. 792.

will be liable for any injury caused by such breach of duty. Arrangements may be made between the company and the party to whom the messages are sent by which a delivery to some third party would relieve the former of further duty.⁷⁹ The sender could not object to such arrangements; for a delivery of a message which would be good in law as between the addressee and the company, is good as between the sender and the company.⁸⁰ A party may instruct the company to leave all messages at his place of business, and a delivery to such place would be a sufficient delivery;⁸¹ or, the addressee may make the company's messenger his agent, so that he could not hold the company for the messenger's mistakes.⁸² But in order to relieve the company of any responsibility, the arrangements to leave the message with some third party, must be made by special agreements between the company and the party to whom the messages are addressed; and, generally the same must be in writing, as a mere verbal instruction to the company's messenger at some place other than at its office would not be sufficient.⁸³

§ 287. Delivery to wife.

Is a delivery of a message to a wife sufficient? In answering this question, it is necessary to consider the circumstances in each particular case. Generally speaking, a delivery to a wife is not *per se* sufficient as matter of law.⁸⁴ The wife, as such, is not in law the general agent of her husband.⁸⁵ If the husband should be absent from home, the wife may be the proper party to whom the message should be delivered, for, she is the most likely of all persons in the world to know of her husband's whereabouts, and thus be enabled to

⁷⁹ Thompson v. West. U. Tel. Co., 10 Tex. Civ. App. 120, 30 S. W. 250; West. U. Tel. Co. v. Pearce, 95 Tex. 578, 68 S. W. 771, reversing 67 S. W. 920, and distinguishing West. U. Tel. Co. v. Young, 77 Tex. 245, 13 S. W. 985, 19 Am. St. Rep. 751.

⁸⁰ Norman v. West. U. Tel. Co., 31 Wash. 577.

⁸¹ West. U. Tel. Co. v. Woods, 56 Kan. 731, 44 Pac. 1093.

⁸² Norman v. West. U. Tel. Co., 31 Wash. 577.

⁸³ Given v. West. U. Tel. Co., 24 Fed. 119.

⁸⁴ West. U. Tel. Co. v. Mitchell, 91 Tex. 454, 66 Am. St. Rep. 906, 40 L. R. A. 209; West. U. Tel. Co. v. Moseley, 28 Tex. Civ. App. 562.

⁸⁵ West. U. Tel. Co. v. Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209.

send the message to him immediately.⁸⁶ And the husband, in case of his absence from home, may be estopped from denying the rights of his wife in accepting a message for him. Thus, if she has been at the head of his business, about which the message concerns, or, if it has been the custom for the messages to be delivered to her in his absence, the company, under such circumstances, would be justified in delivering the message to her; but even then, if the message has importance on its face, the company would not be relieved from its duty to deliver to the addressee until after having made diligent search and inquiry for him. The reason of this, is, that the business about which the message pertains, may be different from that over which the wife may have control, and about which she may have any knowledge. While it may be likely that the wife would know of her husband's whereabouts, in a general way, when absent from his home town, yet it is not possible that she has been informed of all of his business affairs. So the contents of a message may be concerning business of great importance to him and on which he would act immediately, but if delivered to his wife, she might not, for the above reason, notify him immediately of the contents, whereby he would be injured by her negligence.⁸⁷ It is, therefore, better to impose the duty upon the telegraph company to deliver messages to the addressee in person, especially where it shows importance on its face; or, when it is about business of which the wife has no knowledge; and this duty does not cease until the company has made diligent inquiries for the addressee.

§ 288. Delivery to hotel clerk—not sufficient.

It has been held that when a telegraph company has delivered, to a clerk of a hotel, a message addressed to one of the guests or boarders in his absence from his place of business, and the same is receipted by the clerk, that the company has fulfilled its duties. The ground on which this reason was based, was, that it was one of the implied duties of a hotel clerk to receive and accept all messages addressed to their guests or boarders in their absence.⁸⁸ But there is a later opin-

⁸⁶ *Given v. West, U. Tel. Co.*, 24 Fed. 119.

⁸⁷ [d].

⁸⁸ *West, U. Tel. Co. v. Trissal*, 93 Ind. 566.

ion—and a better one we think—which holds to the contrary. In this case the court, said: "The question presented is whether or not the mere relation of hotelkeeper and lodger and boarder creates, in law, an authority in the former or his clerk to receive telegrams addressed to the latter. It must be answered in the negative, since there is no evidence stated from which it might be inferred as a fact that Cobb had constituted the clerk of the hotel his agent or servant for such purposes, there is nothing to be considered but the fact that he boarded and lodged at the hotel. If such an authority arose from that fact alone, it could only be because the performance of such services by the keeper of the hotel was among the duties imposed on him by law toward those so boarding with him. Should it be assumed that the full relation of innkeeper and guest existed (which does not appear), and that all of the duties arising from it rested on the keeper of this hotel, we know of no authority that would include among them that of receiving and assuming the responsibility of safely delivering telegrams. We can see no reason why such a duty would exist, if not voluntarily assumed, any more than that of receiving other notices or transacting other business for the boarder."⁸⁹ Of course if it has been the custom to deliver all messages to a hotel clerk and a special arrangement to that effect has been made between the latter and guest or boarder, then a delivery to the clerk will be sufficient.

§ 289. Where two parties have same name—delivery to one.

It may occasionally happen, that there are two parties at the place the message is sent, having the same name as that to which the message is addressed. Under such circumstances, has the company performed its duty when it has delivered the message to one of these parties? The answer to this question rests wholly and entirely upon the fact as to whether or not the company has any knowledge, whatever, derived from any source, of the real party addressed. Thus, if the company has been conducting a communication prior thereto for one of these parties, or, if the telegram is in reference to the business, occupation or standing of one of these parties, or, if one of these parties, to whom the message may be delivered ascertains the fact

⁸⁹West. U. Tel. Co. v. Cobb, 95 Tex. 333, 67 S. W. 87.

93 Am. St. Rep. 862, 58 L. R. A. 698.

after reading it that he is not the real addressee and informs the messenger or operator of this fact: or, if there is any other means by which the company may be enlightened as to who the real addressee is, it will not be relieved from liability until the message shall have been delivered to him, or good reasons shown for not doing so.⁹⁰ If, on the other hand, the company has no means of ascertaining which of the two parties is the real addressee, a delivery to one is sufficient.

§ 290. In care of another.

When a message is addressed to one party in care of another, the company has performed its duty when it delivers the message to the party in whose care it is directed. The telegraph company contracts to deliver the message to the party in whose care it is directed and not to the addressee; and when it has performed this duty, its liability ceases.⁹¹ Such delivery is sufficient although no effort has been made to find the addressee.⁹² And when the address is in care of a railroad company at a certain place, a delivery to its agent there is sufficient.⁹³ It has further been held that a delivery to the party, in whose care it is sent, is sufficient although he refuses to accept the message;⁹⁴ but we think a better holding is, that when this party refuses to accept the message and the company knows of the real addressee's whereabouts, it should make reasonable efforts to deliver the message to him, especially when the message shows importance on its face.⁹⁵ If the person, in whose care the message is sent, cannot be found, it is the duty of the company to make diligent search for the party addressed;⁹⁶ in order to entirely relieve the company it would be a good

⁹⁰ *Sherrill v. West. U. Tel. Co.*, 116 N. C. 656, 21 S. E. 400.

⁹¹ *Lefler v. West. U. Tel. Co.*, 131 N. C. 355, 42 S. E. 819, 59 L. R. A. 477; *West. U. Tel. Co. v. Young*, 77 Tex. 245, 13 S. W. 985, 19 Am. St. Rep. 751; *West. U. Tel. Co. v. Thompson*, 31 S. W. 318; *West. U. Tel. Co. v. Houghton*, 82 Tex. 561, 17 S. W. 846, 27 Am. St. Rep. 918, 15 L. R. A. 129n; *West. U. Tel. Co. v. Elliott*, 7 Tex. Civ. App. 482, 27 S. W. 219.

⁹² *West. U. Tel. Co. v. Terrell*, 10 Tex. Civ. App. 60, 30 S. W. 70.

⁹³ *Lefler v. West. U. Tel. Co.*, 131 N. C. 355, 42 S. E. 819, 59 L. R. A. 477.

⁹⁴ *West. U. Tel. Co. v. Thompson*, 31 S. W. 318.

⁹⁵ *Hudson v. Postal Tel. Cable Co.*, 132 N. C. 460, 43 S. E. 943.

⁹⁶ *West. U. Tel. Co. v. Houghton*, 82 Tex. 561, 17 S. W. 846, 15 L. R. A. 129n, 27 Am. St. Rep. 918; *West. U. Tel. Co. v. Jackson*, 19 Tex. Civ. App. 273, 46 S. W. 279.

plan for the sender to be notified of this fact; and yet, it is not a necessary duty to do this, unless the same is practicable. An agreement may be made between either the sender or addressee and the company's operator, to deliver the message to a certain person in a certain manner, and, when the company has complied with this agreement, it will be relieved from further responsibility.⁹⁷ But whatever arrangements this third party may have made with the company with respect to the message addressed to him, will not be binding with respect to the messages addressed in his care.⁹⁸ Thus, if there is an arrangement made between the company and the third party whereby all messages may be delivered to him by telephone, this does not mean that messages sent in his care may be delivered in the same manner, but, in such cases, it is the duty of the company to deliver to him in person a written copy of the telegram.⁹⁹ The reason of this rule is very clear. When a message is addressed to this party and is delivered to him over a telephone or by other similar means, by an agreement to that effect, it has reached its destination and he is in a position to understand its contents and may act on it as he may see fit; but, in the other instance, where he is the party in whose care it is addressed, he is not a principal and may not be in a position to comprehend its meaning nor understand it sufficiently to enable him to redeliver it to the addressee correctly and promptly. He should have a written copy delivered to him by the company in order that he may deliver to the real addressee the same identical message received by him.

§ 291. To authorized agent.

A delivery will be sufficient, if it is made to a clerk of a hotel of which the addressee is a guest or boarder; or, to the wife of the addressee; or, a member of a firm or corporation; or, to any other party, who is authorized to act as agent in receiving messages. But, in order for the company to be relieved from any liability, the message must be delivered to that party. Thus, where a mes-

⁹⁷ *Thompson v. West. U. Tel. Co.*, 10 Tex. Civ. App. 120, 30 S. W. 250.

⁹⁸ *West. U. Tel. Co. v. Pearce*, 95 Tex. 578, 68 S. W. 771.

⁹⁹ *Norman v. West. U. Tel. Co.*, 31 Wash. 577.

sage was addressed to "T. W. Pearsall & Co.," but the company delivered it in an envelope addressed "T. W. Pearsall," a member of the firm of T. W. Pearsall & Co., it was considered at the office of T. W. Pearsall & Co., as Mr. Pearsall's private mail and was not opened until his arrival. It was an important message requiring immediate attention, and would have been attended to promptly had it been addressed to the firm instead of to Mr. Pearsall personally. In consequence of the delay thus occasioned, the plaintiff suffered damage for which it was held that he could recover of the company.¹⁰⁰ It is not necessary, in every instance, to authorize anyone to act as agent for the party addressed, but if there is shown sufficient proof that the addressee cannot be found after diligent search, there is an implied agency existing between the sender and some one closely allied in the sendee's business or social affairs after the former has been notified of this fact; as where the telegraph company telephoned to the addressee's place of business and learning that he was out of town for several days, caused the message to be delivered to his wife at his residence, and then informed the sender of what had been done, it was held that this was a sufficient delivery.¹⁰¹

§ 292. Manner of delivery—written copy.

It is incumbent upon a telegraph company, as one of its essential duties, to deliver to the addressee a written copy of the telegram. This is always the best means by which the exact words of the message may be delivered, in order that the addressee may act thereon. It would be very difficult for operators or messengers to understand and remember the contents of all messages received by them during their daily course of business. Their minds being taxed with other business, it would be impossible for them to remember exactly the wording of any particular message, especially where they are not further interested in it than that of receiving it as all other; and when they have no knowledge—and it is presumed that they have none—of the business about which the message is sent, they surely could

¹⁰⁰ Pearsall v. West. U. Tel. Co., 44 Hun (N. Y.) 532; affirmed 124 N. Y. 118, 256, 21 Am. St. Rep. 662.

¹⁰¹ Given v. West. U. Tel. Co., 24 Fed.

not understand it as well as the party to whom it was addressed. For these reasons, the best means of delivering the exact words of a message is by delivering a written copy of the message. Furthermore, the sendee having this written copy before him is much more capable of advising himself how to act upon same. By having a written copy of the telegram, the errors or the inaccuracies, which may be made in the transmission, could be shown more easily by comparing this copy with the one delivered to the company for transmission.¹⁰² If it true that the sendee may waive this duty of the company, as by granting it the right to deliver the message over a telephone line;¹⁰³ but none save messages addressed to the sendee could be waived. If it were only delivered to him in care of another he could not waive this duty, but the same would have to be delivered in writing.¹⁰⁴ When telegrams are addressed to him and delivered by telephone, the messenger acts as his and not the company's agent in that particular business.

§ 293. No duty to forward messages.

A telegraph company is under no obligation to forward a telegram to a party who has moved into another locality, but this duty may be assumed by an agreement, to that effect, entered into between the company at its office and the sender.¹⁰⁵ Thus, it has been held, that when the company has been paid the extra charges for delivering beyond the free delivery limit, and payment for any additional charges has been guaranteed,¹⁰⁶ the operator at the receiving station, knowing that the message is important, and that the addressee is temporarily in another city—where the company had an office—is under a duty to send it to him there, and for his failure, in this respect, will lay the company liable.¹⁰⁷ But the company is not liable for failing to forward a message to an absent addressee, where it exercises due diligence to make personal delivery, and the

¹⁰² *Brosnens v. West. U. Tel. Co.*, 45 Mo. App. 433; *West. U. Tel. Co. v. Pearce*, 95 Tex. 578, 68 S. W. 771.

¹⁰³ *Norman v. West. U. Tel. Co.*, 31 Wash. 577.

¹⁰⁴ *West. U. Tel. Co. v. Pearce*, 95 Tex. 578, 68 S. W. 771.

¹⁰⁵ *Thorp v. West. U. Tel. Co.*, 84 Iowa 190, 50 N. W. 675; *West. U. Tel. Co. v. Bierhans*, 8 Ind. App. 563.

¹⁰⁶ *Abbott v. West. U. Tel. Co.*, 86 Minn. 44, 90 N. W. 1.

¹⁰⁷ *West. U. Tel. Co. v. Hendricks*, 26 Tex. Civ. App. 366, 63 S. W. 341.

operator is not aware of his temporary address, although, the messenger boy in charge of the message might easily have learned where the addressee was, if he had inquired at any of the places where he attempted to make delivery.¹⁰⁸ Where an agreement is made of this kind to forward a message, it is binding on the company only for a reasonable time, which is a question of fact.¹⁰⁹

§ 294. Time to deliver.

It is the duty of all telegraph companies, after assuming the responsibilities attached to the nature of a business which they follow, to deliver messages to the proper party as soon after their transmission as is reasonably practicable;¹¹⁰ and on a failure so to do, they will be liable for all the damages arising directly therefrom.¹¹¹ It is as great if not a greater duty to make a prompt delivery as to exercise same in its transmission.¹¹² It is not an easy matter to lay down a fixed rule, prescribing the degree of promptness necessary in the delivery of every particular message. They must deliver the message as soon as reasonably practicable after its transmission, and, in determining this question it is necessary to take into consideration the surrounding circumstances. Thus, if the company's office to which the message is sent, is a small business office, on account of which there are only a few messengers required in the general course of business, and there is an extra amount of telegraphic work going on at the time the message is sent, a delay, caused by such rush of business, must be considered in determining the question of negligent delay in delivery.¹¹³ The time required for copying and ad-

¹⁰⁸ West. U. Tel. Co. v. Redinger, 63 S. W. 156.

¹⁰⁹ Harper v. West. U. Tel. Co., 92 Mo. App. 304.

¹¹⁰ Harkness v. West. U. Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672; Bliss v. Baltimore, etc., Tel. Co., 30 Mo. App. 103; Cannon v. West. U. Tel. Co., 100 N. C. 300, 6 Am. St. Rep. 590, 6 S. E. 731.

¹¹¹ Hendricks v. West. U. Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; West. U. Tel. Co. v.

Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844. The operator has no right to speculate as to the probable effect of promptness or delay in delivering. Telephone company v. Brown, 104 Tenn. 56, 78 Am. St. Rep. 906, 50 L. R. A. 277, 55 S. W. 155.

¹¹² West. U. Tel. Co. v. Moore, 12 Ind. App. 136, 54 Am. St. Rep. 515.

¹¹³ West. U. Tel. Co. v. Neel, 86 Tex. 368, 40 Am. St. Rep. 847.

addressing the message and for numbering it,¹¹⁴ the distance the sendee lives from the office, and the difficulty in reaching him, must be considered in determining the degree of diligence exercised. A telegram delivered in its regular order, within half an hour of the time it was received at its destination, is delivered within a reasonable time;¹¹⁵ and where the operator promised the addressee to deliver his message "at once," the company is still bound to ordinary diligence.¹¹⁶ A delay of five hours in delivering a message, the urgency of which is known to the company, is negligence, when it attempts to find the addressee down town and at his office, but fails to leave notice there or to visit his residence within the free delivery limits, where he might have been found.¹¹⁷ What is due diligence in this respect is a question of fact, and not one to be left to the judgment of the company.¹¹⁸

§ 295. Same continued—two messages of same nature received within office hours.

There is a peculiar duty with respect to the time of delivery where there are two messages having relation to the same matter, and transmitted to the same party within a short period of each other, but the first delivered is not transmitted until after the other. If the company is not guilty of negligence in delivering one before the other, it will not be liable. It may have good reasons to give why this accident was caused, as that the telegrams were sent out by the two different messengers, but the one carrying the second message happens to find the sendee before the first.¹¹⁹ But if the messages show on their faces—which they ought to show—the time when each was delivered to the company, the sendee could hardly be heard to com-

¹¹⁴ West. U. Tel. Co. v. McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592; Davis v. West. U. Tel. Co., 66 S. W. 17, 23 Ky. L. Rep. 1758; West. U. Tel. Co. v. Virginia Paper Co., 87 Va. 418, 12 S. E. 755.

¹¹⁵ Julian v. West. U. Tel. Co., 98 Ind. 327.

¹¹⁶ West. U. Tel. Co. v. De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792.

¹¹⁷ Hendershot v. West. U. Tel. Co., 106 Iowa 529, 76 N. W. 828, 68 Am. St. Rep. 313.

¹¹⁸ Telephone Co. v. Brown, 104 Tenn. 56, 78 Am. St. Rep. 906, 50 L. R. A. 277, 55 S. W. 155.

¹¹⁹ Cannon v. West. U. Tel. Co., 100 N. C. 300, 6 Am. St. Rep. 590, 6 S. E. 731.

plain, for he would have notice of the time when they were transmitted and could act accordingly. The company may make reasonable office hours, within which all messages should be received for immediate delivery, and should they not be received within that time, the company would not be duty bound to deliver the message until the office was opened, and as soon thereafter as practicable. A person, desiring a message delivered at an usual hour, should inquire whether it will be delivered at that time, and, in the absence of such inquiry, the telegraph company does not become answerable for the delay by its failure to volunteer the information that the office to which the message is addressed, is not open for business until later.¹²⁰ And if two messages are delivered to the company for transmission at different times, but the office, to which they were to be sent, is closed when both are delivered, the company would not be liable in the absence of negligence, if the second message should be delivered before the one first tendered for transmission.¹²¹

§ 296. Free delivery limit.

In many instances, the addressee of a message lives some distance from the company's office, and, to require the latter to deliver the message to such party, without extra compensation, might impose on it an unreasonable burden, so these companies may prescribe rules by which they may agree to deliver all messages within a certain radius of their offices, free of charge and require extra compensation for all delivery beyond this radius.¹²² These regulations are generally

¹²⁰ *West. U. Tel. Co. v. Neel*, 86 Tex. 368, 40 Am. St. Rep. 847, 25 S. W. 15.

¹²¹ *Cannon v. West. U. Tel. Co.*, 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590; *Hocker v. West. U. Tel. Co.*, 34 So. (Fla.) 901.

¹²² "Free delivery within a half-mile is not a restriction of a right, but a qualified privilege granted. It is not an inherent right; for if it were, in the absence of restriction, it would have no limits. To show to what absurd results this would lead, let us

suppose the contract to transmit a message is silent about free delivery. If we hold the clause in controversy to be restricted of a right, then, in the case supposed, the telegraph company would be bound to deliver to the sendee, no matter how great the distance to his residence. Free delivery is a conditional obligation, contingent on the sendee's residence being within the area of free delivery; and until the condition is shown, the telegraph company is not put in default." *West. U. Tel. Co. v. Henderson*, 89 Ala.

to be found on the telegraph blanks, and are presumed to have been accepted at the time of signing and delivery of the telegram to the company. While this is the general way these regulations are made and entered into, yet there are statutes in some states containing the same stipulations, and they bind all who contract business with these companies within their jurisdiction. Of course, this free delivery limit must be reasonable, and in determining this question the surrounding circumstances must be considered. The size of the town or city and location of the surrounding country are the principle questions to be considered in arriving at this fact. It has been held that a radius of one half mile in a city of five thousand inhabitants, and a radius of one mile in cities having more than this number, was a reasonable distance within which to give free delivery.¹²³ When the addressee lives beyond the free delivery limit, and this fact is known by either the company's operator or the sender, it is the duty of the latter to pay an extra compensation for such delivery; and, the company is under no obligation to accept the message for transmission until this is paid. It is held in some courts that if the fact is not known by either the sender or the operator that the sendee lives beyond the free delivery limit, the company is under no obligation to deliver the message, if the extra charges are not paid, waived or guaranteed to be paid;¹²⁴ but the better holding, however, is that the company is under obligations to deliver the message if the sendee lives within a reasonable distance beyond the delivery limit, provided he will pay for such extra charges.¹²⁵ It will hardly be nec-

510, 7 So. 419, 18 Am. St. Rep. 153; West. U. Tel. Co. v. Ward, 23 Ind. 377, 85 Am. Dec. 462; West. U. Tel. Co. v. Redinger, 22 Tex. Civ. App. 362, 54 S. W. 417.

¹²³ West. U. Tel. Co. v. Trotter, 55 Ill. App. 659.

¹²⁴ West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; Whittemore v. West. U. Tel. Co., 71 Fed. 651; West. U. Tel. Co. v. Matthews, 107 Ky. 663, 55 S. W. 427; Rohe v. West. U. Tel. Co., 70 S. W. 39, 24 Ky. L. Rep. 845; West. U. Tel. Co. v. Cross, 74 S. W. 1098; Anderson

v. West. U. Tel. Co., 84 Tex. 17, 19 S. W. 285; West. U. Tel. Co. v. Warren, 36 S. W. 314; West. U. Tel. Co. v. Drake, 13 Tex. Civ. App. 572, 36 S. W. 786.

¹²⁵ West. U. Tel. Co. v. Moore, 12 Ind. App. 136, 54 Am. St. Rep. 515. The court in this case disagreed with the holding in the case of West. U. Tel. Co. v. Henderson, above cited, and said: "We are aware that in West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148, it is declared that the sender is bound to know whether the sendee lives within

essary, at this place, to enter into the reasons given to sustain each of the above holdings; but suffice it to say that these companies may prescribe regulations whereby they may exact of all their patrons, an extra compensation for all deliveries made beyond the free delivery limit, when the fact is known at the time the message is tendered for acceptance. And on failure so to do, the company is under no obligation to accept the message; but if the fact is not known, it is the duty of the company to deliver the message on the sendee's paying for the extra charges. In those jurisdictions holding the first rule, it is held that the company may waive the right to exact of the sender the extra compensation;¹²⁶ or he may give a written guaranty to pay all additional charges incurred in delivering the message be-

the free delivery limits and must himself provide, beforehand, for delivery if he does not. We do not, however, concur in the reasoning or conclusion of this case upon this proposition. Many men have occasion to communicate with others in cities and towns where they are totally ignorant of the distances between the company's receiving station and the addressee's residence. Even if they know the street and number, they may still be wanting in a knowledge of the location with reference to the station.

Such a regulation as we are now considering would, as it seems to us, be harsh, inequitable and unnecessary. When the patron pays to the company the amount which he believes, in good faith, covers its entire charge for the service, and the company receives it and the message, he has a right to expect that the company will carry the message to the person addressed, if within the statutory delivery limits, and present it to him for delivery. If there be then any additional sum due, the company may require its payment before it surrenders the message to the sendee, if it prefers to do so rather than rely solely upon the sender for its payment. The company

will thus be furnished ample protection, and the expectations and purposes of the sender of the message will not be disappointed.

This course seems to us to afford a much fairer and more equitable solution of the problem as to what is the duty of the company than to hold that it may stop the message half way upon its course, and thus really render to the sender no service, after receiving from him what both thought to be the full price therefor. We apprehend that, if such a course were followed, there would be few instances where the sendee would refuse to receive the message, and pay the delivery charge if proper.

If he did a notification to the sender, in most of those few instances would bring the money from him. If, however, the company might occasionally lose a delivery charge, the loss to it would be trifling and inconsiderable when compared with the possible loss and inconvenience to the public and patrons who have relied in good faith upon their delivery of the message."

¹²⁶ *Roche v. West. U. Tel. Co.*, 70 S. W. 39, 24 Ky. L. Rep. 845; *West. U. Tel. Co. v. O'Keefe*, 29 S. W. 1137.

yond the free delivery limit,¹²⁷ and then the company is under obligation to deliver.

§ 297. When sendee lives several miles from office.

Very often messages are sent to persons who live in the country or several miles from the receiving office of the company; and then, surely, the latter would be under no obligation whatever to make such delivery,¹²⁸ unless there is a special agreement to that effect.¹²⁹ It has been held without much plausible reason that when this extra charge is refused to be paid by either sender or the addressee, the company would not be under any obligations to deliver the message, even when it would not necessarily be put to any additional expense. Thus, where the agent at the receiving office notifies the addressee by mail, and also asks that the extra charges be guaranteed by him, the agent is not liable for refusing to give the message to a neighbor who offers to deliver it without charge.¹³⁰ If the charges for transmission have not been paid, the agent would clearly have the right to refuse to deliver the message to this party; but if there is nothing except the extra charge for delivery left unpaid, and the company is put to no extra expense in making such delivery, as in the cited case, and the manner of delivery is acceptable to the addressee, we see no reason why the agent should not make such delivery. While the company will be under no obligations to deliver a message to a party who lives several miles from the receiving office without first being compensated, yet this is no reason why it may not use diligence in attempting to deliver the message to him while temporarily within the free delivery limits.¹³¹

§ 298. Same continued—may waive right.

If the addressee lives beyond the free delivery limits, and this fact is known by the company's operator at the time the message is

¹²⁷ Reynolds v. West. U. Tel. Co., 81 Mo. App. 223.

¹²⁸ West. U. Tel. Co. v. Matthews, 107 Ky. 663, 55 S. W. 427; West. U. Tel. Co. v. Swearinger, 95 Tex. 420, 67 S. W. 767, reversing 65 S. W. 1080; West. U. Tel. Co. v. Taylor, 3 Tex. Civ. App. 310, 22 S. W. 532.

¹²⁹ West. U. Tel. Co. v. Matthews, 67 S. W. 849, 24 Ky. L. Rep. 3.

¹³⁰ West. U. Tel. Co. v. Swearinger, 95 Tex. 420, 67 S. W. 767.

¹³¹ Rasser v. West. U. Tel. Co., 130 N. C. 251, 41 S. E. 378; West. U. Tel. Co. v. Davis, 30 Tex. Civ. App. 590, 71 S. W. 313.

received it may, nevertheless, become liable for a failure to deliver, when it has waived its right to collect for the extra charge.¹³² What is necessary to constitute a waiver is a question of fact, and where the company has been accustomed to accept messages addressed to certain parties living beyond this free delivery limit for a long time, it will be presumed that it has waived its rights.¹³³ In those jurisdictions which hold that a company is under no obligation to deliver a message to an addressee living beyond the free delivery limit, without the prepayment of the extra charge, it is generally the custom for the operator at the receiving office to notify the sender of the fact that the sendee lives beyond these limits, and the amount of the extra charge necessary to be paid; and, on a failure to do this, the company will be liable for non-delivery.¹³⁴ But if the sender cannot be found, after reasonable search, in order that he may be informed of this fact, the company will then have discharged its duty and will not be liable for the non-delivery. Whatever the custom may be with respect to the delivery of messages beyond the free delivery limit, and the manner of collecting the extra compensation, the regulations requiring prepayment of special charges will be strictly construed against the company.¹³⁵

§ 299. No delivery limit fixed.

If there is no free delivery limit fixed, either by the company or by statute, it is presumed that the company will deliver all messages

¹³² *Whittemore v. West. U. Tel. Co.*, 71 Fed. 651; *West. U. Tel. Co. v. Matthews*, 67 S. W. 849, 24 Ky. L. Rep. 3; *West. U. Tel. Co. v. Robinson*, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431n; *West. U. Tel. Co. v. Teague*, 8 Tex. Civ. App. 444, 27 S. W. 958; *West. U. Tel. Co. v. Hargrove*, 14 Tex. Civ. App. 79, 36 S. W. 1077; *West. U. Tel. v. Sweetman*, 19 Tex. Civ. App. 425, 47 S. W. 676; *West. U. Tel. v. Davis*, 30 Tex. Civ. App. 590, 71 S. W. 313.

¹³³ *West. U. Tel. Co. v. Womack*, 9 Tex. Civ. App. 607, 29 S. W. 932; *West. U. Tel. Co. v. Robinson*, 97

Tenn. 638, 37 S. W. 545, 34 L. R. A. 431n; *West. U. Tel. Co. v. Cain*, 40 S. W. 624; *West. U. Tel. Co. v. Davis*, 24 Tex. Civ. App. 427, 59 S. W. 46.

¹³⁴ *Evans v. West. U. Tel. Co.*, 56 S. W. 609; *West. U. Tel. Co. v. Pearce*, 70 S. W. 360. Where such notice is not given, it would be evidence of negligence. *Hendricks v. West. U. Tel. Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; *Bright v. West. U. Tel. Co.*, 132 N. Car. 317, 43 S. E. 841; *Bryan v. West. U. Tel. Co.*, 133 N. C. 603, 43 S. E. 841.

¹³⁵ *West. U. Tel. Co. v. Moore*, 12 Ind. 136, 54 Am. St. Rep. 515.

to parties who live within a reasonable distance of the company's office. It is not to be understood, when these message blanks contain a stipulation that messages will be delivered free within the established free delivery limits of the terminal office and that for a greater distance a special charge will be made to cover the cost of such delivery, that this prescribes or fixes a free delivery limit, but that it gives the company the right to make a limit: and until such is made it is presumed that the company will deliver to all who live within a reasonable distance from the terminal office. What is a reasonable distance is a question for the jury, and must be determined by a consideration of the surrounding circumstances.¹³⁶

§ 300. Must use due diligence to deliver.

The company must exercise due diligence and effort to find the addressee of a message and deliver same to him.¹³⁷ We may say that there is even a greater amount of diligence required on the part of a telegraph company in making an effort to find the addressee and deliver the message to him than to be exercised in its transmission. For, if there is an immediate effort to transmit, and the company is unable on account of some unavoidable hindrance to do so, the sender may be notified in time to pursue another course if possible. But when the message has been transmitted to the operator at the terminal office, it will be so far beyond his reach as to prevent him from ascertaining the condition of affairs. It is then not incumbent on him to find out whether or not the company is exercising diligence in delivering the message; ¹³⁸ or even whether it has delivered it at all. It is always presumed that the company is exercising diligence in the transmission and delivery of its messages, and the sender, for this reason, would likely be laboring under the belief that the message

¹³⁶ West. U. Tel. Co. v. Russel, 31 S. W. 698.

¹³⁷ Pope v. West. U. Tel. Co., 9 Brdw. (Ill.) 283; Bliss v. Baltimore, etc., Tel. Co., 30 Mo. App. 103; Julian v. West. U. Tel. Co., 98 Ind. 327; Harkness v. West. U. Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672; West. U. Tel. Co. v. Gougar, 84 Ind. 176; West. U. Tel. Co. v. Moore,

12 Ind. App. 136, 54 Am. St. Rep. 515; Manville v. West. U. Tel. Co., 37 Iowa 214, 18 Am. Rep. 8; Mackay v. West. U. Tel. Co., 16 Nev. 222; West. U. Tel. Co. v. Fatman, 73 Ga. 285, 54 Am. Rep. 877.

¹³⁸ West. U. Tel. Co. v. Chamblee, 122 Ala. 428, 25 So. 232, 82 Am. St. Rep. 89.

had been delivered promptly and accomplished the desired results. Reasonable diligence exercised in the finding of the sendee and a promptness to deliver same to him, is a part of the contract of transmission, and a failure to do either is no transmission.¹³⁹

§ 301. Same continued—illustrations.

It is not enough to attempt a delivery at the office or place of business of the person addressed; ¹⁴⁰ especially when he, as well as his place of residence, is well known in the town where the message is received.¹⁴¹ Failing in the attempt to deliver a message after business hours or on Sunday, will not excuse a failure to deliver;¹⁴² and where it was said that "the unsuccessful attempts of the company's agent to deliver said message at the business house of Arthur Peter & Company, the addressee, either on Saturday night after the close of business hours, or on Sunday where there are not or should not be any business hours, certainly affords no reasonable excuse for the non-delivery of, or for want of an effort to deliver, the said message during business hours of the succeeding Monday." A company failed to exercise due diligence in delivering a message, where it was given to a messenger, who took it to the addressee's place of business and was there told that the latter was five miles in the country, but that a person was going out there and would carry it; and the message was taken back to the office and no further attempt made to deliver it, though the house of the addressee was about one-half mile from the terminal station in a town where there were no prescribed free delivery limits.¹⁴³

§ 302. Diligence exercised—evidence—burden of proof.

When a telegraph company fails to deliver a message to the party addressed, or when it is delivered but not immediately, the question which necessarily presents itself is, Whether or not it is a question of

¹³⁹ West. U. Tel. Co. v. Gougar, 84 Ind. 176.

¹⁴⁰ Pope v. West. U. Tel. Co., 9 Ill. App. 587.

¹⁴¹ West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728n.

¹⁴² West. U. Tel. Co. v. Lindley, 62 Ind. 371.

¹⁴³ West. U. Tel. Co. v. Russel, 31 S. W. 698. See, also, Sherrill v. West. U. Tel. Co., 116 N. C. 655, 21 S. E. 429.

fact to be decided by a jury, or a question of law for the court? If the evidence in the case is so very clear as to show to any reasonable and fair-minded man that the company was not negligent in making a reasonable effort to deliver the message sent, or if it is an undisputed fact, it is a question for the court.¹⁴⁴ But if the evidence on this point is conflicting, it is a question of fact.¹⁴⁵ In order to ascertain the fact as to whether a telegraph company has been negligent in delivering a message promptly, for which it would be liable for all damages arising therefrom, all the facts pertaining to the case must be considered. No two cases arise with the same state of facts and the facts, necessary to be considered, are not always the same. The burden of proof to show that the company exercised due diligence in the delivery of the message, is on the company. Thus, the fact that the person addressed was not at the office and could not be found so that the message could be delivered to him, is a matter of defense which must be shown by the company;¹⁴⁶ and any information received by the messenger at the office of the addressee as to the whereabouts, is admissible to show that he was not at the time at the place to which the message was sent.¹⁴⁷

§ 303. Failure to designate with accurateness the address.

The sender is presumed to know the name of the party to whom he desires the message to be sent, where he resides and that he has written this accurately and correctly on the telegram. The company's duty is only to transmit and deliver to the person whose name is given, at his address. So, if the company, after having assumed the duty to transmit a message, sends it to the person at the place designated and same is accepted by the person claiming to be the addressee, or an authorized agent of his, it will have discharged its duty, notwithstanding the fact that it was delivered to the wrong party. This may be caused by the contributory negligence of the

¹⁴⁴ *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183, 3 So. 566; *Miliken v. West. U. Tel. Co.*, 110 N. Y. 403, 1 L. R. A. 28; *West. U. Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894; *West. U. Tel. Co. v. Lindley*, 62

Ind. 371; *West. U. Tel. Co. v. Trissal*, 98 Ind. 566.

¹⁴⁵ *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728n.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

sender, by not giving the name and address of the sendee with sufficient accuracy. Thus, if the sender should fail to designate with accurate definiteness the name of the addressee or his place of abode, and the message is delivered to a person claiming to be the party addressed, as where the message is addressed to 291 Rampart street, and is delivered at that number on North Rampart street, upon information that the addressee lived there, instead of being delivered at that number on South Rampart street, where the addressee in fact resided, the company would not be liable.¹⁴⁸ Or, if the sender directs the message to Mrs. La Fountain, Kankakee, a place of twelve or fifteen thousand people, and fails upon request to make the name of the addressee more definite, or to give the street and number of her residence, he is guilty of such contributory negligence as will prevent him from recovering for the failure of the company to deliver the message.¹⁴⁹ But should the sendee's place of business or residence be the only thing improperly given in the message—his name being correctly written and known by the operator at the terminal office—it would be the duty of the company to exercise diligent effort to find and deliver the message at the proper place, and not that designated in the telegram. The address is subordinate to the name of the addressee and is given only as a means of finding the party addressed.

§ 304. Penalty imposed for failure to deliver.

There are statutes in most of the states which impose a penalty on telegraph companies for a failure to promptly transmit and deliver messages intrusted to them, and this penalty may be recovered without alleging or proving any actual damages.¹⁵⁰ But, in other cases, unless the plaintiff proves special injury or actual damage, he can recover nominal damages only.¹⁵¹

¹⁴⁸ *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183, 3 So. 566.

¹⁴⁹ *West. U. Tel. Co. v. McDaniel*, 103 Ind. 294, 2 N. E. 709.

¹⁵⁰ *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; *West. U. Tel. Co. v.*

Buchanan, 35 Ind. 429, 9 Am. Rep. 744.

¹⁵¹ *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; *Cults v. West. U. Tel. Co.*, 71 Wis. 46, 36 N. W. 627.

§ 305. Duty to preserve secrecy of message.

It is the duty of a telegraph company to abstain from using or divulging the contents of messages intrusted to them for transmission. There is a similarity between correspondence by mail and communications by wire, with respect to the rights of the receiver of the letter and the telegraph company over the message. The weight of authority is, that the receiver of a letter has only a right in its tangible property or the paper on which it is written; that the literary qualities or property therein belongs to the writer, and, that it can be used by the former only as a means of carrying out the purposes for which it was written. From this doctrine it follows as a general rule, that the receiver has no right to publish the letter without the consent of the writer, and such publication will be enjoined by a court of equity.¹⁵² The grounds on which the right of injunction is granted for such matters is, that to permit a receiver of a letter to use it for other purposes than that for which it was written, or to permit him to have the right to divulge its contents, would be a breach of bad faith and would tend to create public disturbances and breaches of the peace.¹⁵³ In the application of this principle to telegraph companies in the transmission of messages, it is very important to bear in mind that the company must necessarily be informed of the contents of a message in order that it may be able to transmit it, but that this is the only reason why it should obtain this information. It can obtain no interest either in the tangible property of the telegram, as the receiver of a letter obtains in the letter, nor any interest whatever in it as a literary product. The receiver of a letter may use its contents for the purposes for which it was intended to be used, and may derive profit thereby; but the telegraph company can use the contents or knowledge of the telegram only as a means of correctly transmitting and delivering it, and it would hardly be possible that a telegram would be tendered to them for transmission, out of which they could derive further profit than that acquired for its service. While there is a striking similarity existing between these two parties over letters and telegrams, respectively, while in their possession, yet it seems that the interest acquired by the latter is not

¹⁵² Smith, Per. Prop. 92.

¹⁵³ Smith, Per. Prop. 92; Gray on Tel., § 25.

so great as that of the former. So, if the former can be enjoined from using the letter for other purposes than that for which it was intended to be used, there is no reason why a telegraph company may not be enjoined from using or divulging the contents of the telegram.¹⁵⁴ The duty imposed on telegraph companies in this respect is even greater than that of the receiver of a letter; for the latter has the control over the tangible property of the letter and its contents sent directly in its original form from the writer, and being a principal in the correspondence has surely more liberties with the letter than the former over the messages intrusted to its care. It follows, therefore, that if a telegraph company makes any use or disclosure of its message other than is necessary in the ordinary course of its business, it will be liable to the sender. Involved in every contract for the transmission of a telegraphic dispatch is an obligation on the part of the company to keep its contents secret from the world,¹⁵⁵ for a breach which it will be liable for all actual damages arising directly therefrom and should it be done in a willful or reckless manner, it should be held liable for punitive damages. The company is not liable, however, for a disclosure of a message in court in pursuance to a writ of subpoena *duces tecum*.¹⁵⁶

§ 306. Same continued—imposed by statute.

In some states there are statutes which impose the duty, either upon telegraph companies or upon their operators, to abstain from disclosing the contents of a message intrusted to their care, and for a willful violation of which the wrongdoer is subjected to punishment.¹⁵⁷ These are penal statutes and must, therefore, be strictly construed. So, if the statutes provide that the transmitting operator shall be punished for a violation of the statute, he, and not the company, nor the receiving operator or messenger, shall be punished for the wrong. In other words, if the statute imposes this duty only on the transmitting operator, and the contents of the message are willfully divulged at the other end of the line, either by the receiving operator or messenger boy, the first-named operator would not be guilty of a wrong, nor would the company, unless its servant was

¹⁵⁴ Id.

¹⁵⁶ Gray on Tel., § 25.

¹⁵⁵ Cock v. West. U. Tel. Co., 36 So.

¹⁵⁷ Id.

acting at that time within the scope of his authority. But should the wrong be committed by the company's employee while acting within his apparent authority, the company will be liable for such wrong as any other principal would be for the wrongs of his agent, under similar circumstances.

§ 307. Same continued—applicable to telephone companies.

This duty is applicable to telephone companies. It is the duty of their employees to abstain from divulging or using any of the contents of any communication carried on over their wires, and for a violation of which they will be liable in damages. The strictness of this rule should be very stringently observed, since the operators of these companies are placed in a position to ascertain all the business transactions about which the communications are made, and could, for this reason, injure the communicants very seriously in their business affairs.

§ 308. Messages "in care of" common carriers.

Common carriers, as such, are under no obligation to deliver messages to their passengers. So, if a message is delivered to one of their employees, addressed in care of the common carrier, for one of the passengers on board, they will not be liable for a failure to deliver the message, unless it is the custom or practice for such messages to be delivered; and then it seems that the company would be liable.¹⁵⁸ Arrangements could be made to this effect by special agreement, and under such circumstances, the carrier would be duty bound to make such delivery. If, however, the message is addressed to one of the employees of the carrier and is sent in care of the latter, designating the particular carrier, a delivery to the latter will be sufficient delivery; and it would be the duty of the latter to make a delivery to the party addressed if practicable. But if the message is addressed to one of the employees of another carrier, as that of a sleeping car company, and sent in care of the common carrier of passengers, or railroad company, the latter would not be under any obligation to deliver the message, unless special arrangements have been made to that effect.

¹⁵⁸ *Davis v. Eastern Steamboat Co.*, telegram was delivered to the captain
94 Me. 379, 53 L. R. A. 239, where the of a steamboat.

CHAPTER XIV.

NEGLIGENCE.

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§ 309. In general.

Telegraph companies, having placed themselves before the public to assume public duties, must make suitable preparations to perform those duties as befitting an employment of this or of a similar nature. In order to do this, they should have the best and most suitable machinery and facilities, and the most skilled and experienced workmen; and after being supplied as above required, they must not be guilty of carelessness in the performance of their work, but must exercise ordinary care in the transmission and delivery of all messages intrusted to them. On a failure to exercise reasonable care in the transmission of messages, and on a failure to use due diligence in finding and promptly delivering them to the parties addressed, whereby injury is incurred, they will be liable for all damages arising.

ing therefrom. It is not an easy matter to determine what is ordinary care, but the better holding is, that ordinary care is such care as should be exercised by a responsible man of ordinary understanding and ability under similar circumstances; or such as a prudent man of ordinary mind and understanding would exercise for himself while operating under similar circumstances. In describing the matter in this manner, it is presumed that the very greatest care will be exercised, for it is very reasonable that a man of any judgment and prudence will always exercise the most careful consideration in endeavoring to promote his own welfare.¹ There have been a few courts which have held that there were different degrees of care to be exercised by these companies in the transmission and delivery of messages, or, in other words, that there were different degrees of negligence as a result of the want of care: as that of "due and reasonable care," "ordinary care and vigilance," "reasonable and proper care," "reasonable degree of care and diligence," "care and diligence adequate to the business which they undertake," "with skill, with care, and with attention," "a high degree of responsibility," "great care," or "gross negligence,"² But it seems that all these expressions are expressive of one and the same term, that of ordinary care considered under the pending circumstances. For instance, it may be necessary that a greater degree of care should be exercised in one instance than in another, in the transmission and delivery of the message: as, where the message is transmitted during a storm, it seems that a higher degree of care should be exercised than if it were sent during a calm. This is only ordinary care affected by surrounding conditions which should be considered in de-

¹ Coit v. West, U. Tel. Co., 130 Cal. 657, 80 Am. St. Rep. 153, 63 Pac. 83, 53 L. R. A. 678.

² Fowler v. West, U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; Broese v. U. S. Tel. Co., 48 N. Y. 141, 8 Am. Rep. 526; Leonard v. New York, etc., Tel. Co., 41 N. Y. 571, 1 Am. Rep. 446; Baldwin v. U. S. Tel. Co., 45 N. Y. 751, 6 Am. Rep. 165; Birney v. New York, etc., Tel. Co., 1 Daly,

547; New York, etc., Tel. Co. v. Dryburg, 35 Pa. St. 298; West, U. Tel. Co. v. Graham, 1 Colo. 230; Sweetland v. Illinois, etc., Tel. Co., 27 Iowa 433, 1 Am. St. Rep. 285; West, U. Tel. Co. v. Neel, 57 Tex. 283, 44 Am. Rep. 589; West, U. Tel. Co. v. Hobson, 15 Grat. 122; Pinekney v. Tel. Co., 19 S. C. 71; Smithson v. U. S. Tel. Co., 27 Md. 167; Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79.

termining the want of care. The degree of care to be exercised in the transmission of messages has already been fully discussed.³

§ 310. Presumption of negligence—onus probandi.

Any one claiming to have been injured by the negligence of a telegraph company, and who is endeavoring to recover damages for such injury, must make out a *prima facie* case of negligence on the part of the company before he can have any standing in court. This may be shown either by direct proof to that effect or by evidence which raises the presumption of negligence; and when negligence is shown in either manner, the burden of proof shifts to the company. This presumption, however, may be overcome by other evidence adduced by the company. It is not a general rule, under the law of negligence, that there may be facts submitted which will raise a presumption of negligence, since in many instances proof of negligence must be shown directly; but in the case of telegraph companies—which are exercising public functions, and in the transaction of whose business the highest degree of care must be exercised—there is an apparent exception to this general rule. When an injury has been done to anyone by these companies, it is usually caused by some inadvertence on the part of the latter, the commission of which is wholly and entirely beyond the knowledge of the injured party, but is within the knowledge of the company. For this reason it would be an injustice to impose on the former the duty to prove negligence directly by facts which are only within the knowledge of the company;⁴ but if the party injured produce sufficient proof to show a presumption of negligence, his duty is performed in this respect.⁵ The proof may be so clear in some cases to make out a case of negligence *per se*.

§ 311. Same continued—illustrations.

If there is proof to the effect of an unreasonable delay in the delivery or a failure to deliver, there is a *prima facie* case of negligence made out, and the burden is cast upon the company to exonerate it-

³ See page 203.

⁴ West. U. Tel. Co. v. S. Circle, 103 Ind. 227, 2 N. E. 604.

⁵ Tyler v. West. U. Tel. Co., 60 Ill.

421, 14 Am. Rep. 38; West. U. Tel. Co. v. Griswold, 37 Ohio St. 313, 41 Am. Rep. 500.

self of such.⁶ And where there is a material error,⁷ or where there have been several errors made in the transmission of a telegram, it is presumed that the company has been guilty of negligence, and the facts must be shown to be otherwise or it will be liable.⁸ Thus, where

⁶ *Arkansas*.—Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79.

Indiana.—West. U. Tel. Co. v. S. Circle, 103 Ind. 227, 2 N. E. 604; West. U. Tel. Co. v. Ward, 23 Ind. 377, 85 Am. Dec. 462.

Iowa.—Harkness v. West. U. Tel. Co., 73 Iowa 190, 5 Am. St. Rep. 672, 34 N. W. 811.

Kansas.—West. U. Tel. Co. v. Crall, 38 Kan. 679, 5 Am. St. Rep. 795, 17 Pac. 309.

Kentucky.—West. U. Tel. Co. v. McIlvoy, 107 Ky. 633, 55 S. W. 428; West. U. Tel. Co. v. Fisher, 107 Ky. 513, 54 S. W. 830.

Maine.—Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 447; Fowler v. West. U. Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 216.

Maryland.—U. S. Tel. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519.

North Carolina.—Sherrill v. West. U. Tel. Co., 116 N. C. 655, 21 S. E. 429, 117 N. C. 352, 23 S. E. 277; Rosser v. West. U. Tel. Co., 130 N. C. 251, 41 S. E. 378; Compare Thompson v. West. U. Tel. Co., 106 N. C. 549, 11 S. E. 269.

Pennsylvania.—West. U. Tel. Co. v. Wenger, 55 Pa. St. 262, 93 Am. Dec. 751.

Texas.—West. U. Tel. Co. v. Smith, 46 S. W. 659, 88 Tex. 9; West. U. Tel. Co. v. Cooter, 2 Tex. Civ. App. 624, 21 S. W. 688; West. U. Tel. Co. v. Bonichell, 28 Tex. Civ. App. 23, 67 S. W. 159; West. U. Tel. Co. v. Boots, 10 Tex. Civ. App. 540, 31 S. W. 825; Compare West. U. Tel. Co. v. Barnett, 1 Tex. Civ. App. 558, 21 S. W. 699.

⁷ West. U. Tel. Co. v. Crall, 38 Kan.

679, 5 Am. St. Rep. 799, 17 Pac. 309; Harkness v. West. U. Tel. Co., 73 Iowa 190, 5 Am. St. Rep. 672, 34 N. W. 811.

⁸ *Arkansas*.—West. U. Tel. Co. v. Short, 53 Ark. 434, 9 L. R. A. 744, 14 S. W. 649.

Illinois.—Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38.

Indiana.—West. U. Tel. Co. v. Meek, 49 Ind. 53.

Iowa.—Turner v. Howkeys, Tel. Co., 41 Iowa 458, 20 Am. Rep. 605.

Louisiana.—La Grange v. Southwestern Tel. Co., 25 La. Ann. 383.

Maine.—Ayer v. West. U. Tel. Co., 79 Me. 493, 1 Am. St. Rep. 353.

Mississippi.—West. U. Tel. Co. v. Goodbar, 7 So. 214.

Missouri.—Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; Lee v. West. U. Tel. Co., 51 Mo. App. 375.

New York.—Rittenhouse v. Independent Line of Tel., 44 N. Y. 263, 4 Am. Rep. 673; Persall v. West. U. Tel. Co., 124 N. Y. 256, 21 Am. St. Rep. 662; affirming 44 Hun (N. Y.) 532, criticising Breese v. West. U. Tel. Co., 48 N. Y. 132, 8 Am. Rep. 526.

Ohio.—West. U. Tel. Co. v. Griswold, 37 Ohio St. 303, 41 Am. Rep. 500.

Pennsylvania.—New York, etc., Printing Tel. Co. v. Drybury, 35 Pa. St. 298, 78 Am. Dec. 338.

Texas.—West. U. Tel. Co. v. Harper, 15 Tex. Civ. App. 37, 39 S. W. 599; West. U. Tel. Co. v. Oden, 21 Tex. Civ. App. 537, 52 S. W. 632; West. U. Tel. Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627 (provided there was no

there were three errors made in the transmission of a message containing nine words, the same being sent on a fair day;⁹ or an error in the name of an addressee or sender made in the course of transmission this creates a presumption of negligence.¹⁰ It makes no difference whether the error was or was not made on a connecting line. Thus, in the case of *La Grange v. Southern Telephone Company*, the defendant contended that it was not the first carrier and that plaintiff had failed to prove that the error had occurred on its line, and showed an express provision in its printed blanks that it would not be liable for errors occurring on connecting lines. It was held that the burden of proof was, nevertheless, on the company to show that the error did not occur on its line, since such proof was easily within its power.¹¹

§ 312. Presumption may be rebutted.

When there has been proof adduced which shows a presumption of negligence on the part of these companies, it is not to be understood that this presumption is conclusive, but that it may be rebutted by evidence which will excuse the company of negligence. When this is done there is a shifting of the *onus probandi* from one party to the other, but it is only necessary for the party on whom the burden has last been shifted to prove the falsity of the other's assertion as to the statement which caused the shifting of the *onus*. There must be sufficient evidence shown, however, to rebut the presumption of negligence. Thus, it has been held that these companies are not relieved from liability for an erroneous transmission merely, by showing that their lines were in good order, that approved instruments were used, and that faithful and competent servants were employed, if the particular act complained of shows a negligent performance of their

stipulation for repeating): *West. U. Tel. Co. v. Boots*, 10 Tex. Civ. App. 540, 31 S. W. 825.

⁹ *West. U. Tel. Co. v. Crall*, 38 Kan. 679, 6 Am. St. Rep. 695, 17 Pac. 309.

¹⁰ *West. U. Tel. Co. v. Ragland*, 61 S. W. 421; *West. U. Tel. Co. v. Boots*, 10 Tex. Civ. App. 540, 31 S. W. 825;

West. U. Tel. Co. v. Norris, 25 Tex. Civ. App. 43, 60 S. W. 982; *West. U. Tel. Co. v. Reeves*, 8 Tex. Civ. App. 37, 27 S. W. 318. Compare *West. U. Tel. Co. v. Elliott*, 7 Tex. Civ. App. 482, 27 S. W. 219.

¹¹ *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383.

duty to transmit.¹² Whether or not the company has been guilty of negligence—unless the act which creates the injury is negligence per se—is generally a question for the jury, and it will be an error for the court to take the case from the jury if the facts are conflicting, however strong it may appear that the company has been guilty of negligence.

§ 313. Non-payment of charges—no defense—regulation.

When a telegraph company undertakes to transmit and deliver a message without first demanding a prepayment of the charges for its services, it cannot set up, as a defense to an action brought against it for injuries alleged to have been caused by its negligent acts, the fact that the charges have not been paid. When this duty is assumed without prepayment of compensation, the company must perform the duty regardless of this fact.¹³ But it has been held by some courts that if there is not a prepayment of the extra charge for delivering the message beyond the free delivery limits, the company would not be liable for a delivery or a negligent delay in its delivery, and that the burden was on the injured party to show that the sender lived within the free delivery limits,¹⁴ but as said elsewhere, we are inclined to think that this is not sound doctrine.¹⁵

§ 314. Contributory negligence.

Where an action is brought against a telegraph company, on the ground of its having been guilty of negligence in the transmission and delivery of a message, the principle of the law of contributory negligence may be applied. Therefore, if these companies are guilty of negligence, either in the transmission or delivery of messages in-

¹² *Hunter v. West. U. Tel. Co.*, 130 N. C. 602, 41 S. E. 796; *Fowler v. West. U. Tel. Co.*, 80 Mo. 381, 6 Am. St. Rep. 211; *West. U. Tel. Co. v. Meek*, 49 Ind. 53; *West. U. Tel. Co. v. S. Circle*, 103 Ind. 227, 2 N. E. 604. Compare *Smith v. West. U. Tel. Co.*, 57 Mo. App. 259.

¹³ *West. U. Tel. Co. v. Meek*, 49 Ind. 53; *Milliken v. West. U. Tel. Co.*, 40

N. Y. 403, reversing 53 N. Y. Super. Ct. 111.

¹⁴ *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23; *Kendall v. West. U. Tel. Co.*, 56 Mo. App. 192; *West. U. Tel. Co. v. Wilson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; *Ruse v. West. U. Tel. Co.*, 123 Ind. 274, 7 L. R. A. 583n.

¹⁵ See page 216.

trusted to their care, but the plaintiff on the other hand has failed to exercise ordinary care with respect to his duties toward the company in this particular instance, and which is a proximate cause of the injury or which combines or contributes to it—and without which the injury would not have been inflicted—they will not be liable. A telegraph company may be guilty of negligence without any failure on the part of the plaintiff to exercise ordinary care in these particulars; but there cannot be contributory negligence on the part of the plaintiff, unless the company is guilty of negligence; and, in order for the latter to be excused from its negligence, it must be shown that the plaintiff has contributed to the injury. It is not necessary to show that the plaintiff's contributory negligence was the direct or sole cause of the injury, but if it is shown that it proximately contributed to the cause of the loss it will be sufficient to relieve the company from responsibility.¹⁶ It must, however, be shown that it was a proximate cause. Thus, where the company accepts a message for transmission and undertakes to deliver it about 9 o'clock at night the fact that the sender of the telegram might have filed it earlier in the evening so that it could have reached plaintiff, to whom it was addressed, in time to prevent the injury complained of, this does not make plaintiff guilty of contributory negligence. It is not necessary to discuss the principles of the law of contributory negligence in this treatise, as the same has been very fully considered by other text-writers in works on this particular subject; but it has been thought best to say this much in order to lay a foundation for that which follows.

§ 315. Messages must be legible.

Telegrams should be written legibly; and should a mistake in the transmission or delivery occur on account of a failure to clearly write them out, the negligence will be that of the sender and will, therefore, prevent him from recovering. Thus, where the sender, intending to order by telegraph the sale of "two thousand" cases, wrote what more nearly resembled "ten thousand" cases, and sent the message to the telegraph office by a boy; and the operator transmitted the dis-

¹⁶ West. U. Tel. Co. v. Rawls, 62 S. W. 136.

Hocker v. West. U. Tel. Co., 7 So. (Fla.) 901.

patch "ten thousand," and, in accordance with the regulations of the company, added in the parenthesis the figures "10,000" which was not in the written message; in an action by the addressee against the company for damages sustained by reason of the sale of ten thousand instead of two thousand cases, it was held that the cause of the loss was the negligence of the sender, and there could be no recovery.¹⁷ But if the sender's error is harmless, it will be no defense; as where the message notified plaintiff that his brother was sick at a certain place, when in fact he was not at that place but at another, and the addressee knew his brother was at the latter place, and would have gone there: the error, though made by the sender, is no defense.¹⁸

§ 316. Same continued—address must be definite.

The sender must exercise reasonable care in giving the address of the sendee with sufficient accuracy, and on a failure to do so he will be guilty of contributory negligence. Thus, when a message is addressed to a certain person, who is not known by the company, in a certain street in the city, the company will have performed its duty when it has made a reasonable effort to deliver to the person at that place; and if there is no such person at that place, after having made diligent inquiry to find him there, the company will not be liable, but the loss which may have been incurred will be imputed to the negligence of the sender.¹⁹ An address to "R. street" instead of "South R. street," bars recovery;²⁰ and where a message is sent to a place of 12,000 people and fails to designate the street and number of the address on request, the sender will be guilty of contributory negligence.²¹ If there are two towns of the same name in the state but the operator is informed of the one to which the message is desired to be sent, the company cannot avoid liability by setting up the fact that the address was indefinite.²²

¹⁷ *Koono v. West. U. Tel. Co.*, 102 Pa. St. 164; *West. U. Tel. Co. v. Liddell*, 68 Miss. 1, 8 So. 510.

¹⁸ *Id.*

¹⁹ *West. U. Tel. Co. v. Patrick*, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90; *West. U. Tel. Co. v. McDaniel*, 103 Ind. 294, 2 N. E. 709; *Hargrove v. West. U. Tel. Co.*, 60 S. W. 687. Com-

pare *Beasley v. West. U. Tel. Co.*, 39 Fed. 181. See, also, *Lambert v. West. U. Tel. Co.*, 45 S. W. 1034.

²⁰ *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183, 3 So. 566.

²¹ *West. U. Tel. Co. v. McDaniel*, 103 Ind. 294, 2 N. E. 709.

²² *West. U. Tel. Co. v. Parsons*, 72 S. W. 800, 24 Ky. L. Rep. 208.

§ 317. Operator writing message for sender—his agent.

It has been generally held that where an operator writes the message for the sender at the latter's request, he acts as agent for him and not for the company in this particular matter. His duties toward the company are to receive the messages and the charges for the same, and then to transmit them; when he goes beyond this duty he does not act as the company's agent.²³ While this is the general holding, it seems there is, and ought to be, an apparent exception to the general rule. Thus, if the message is received by the operator over a telephone line and written down by him, the operator then acts for the company,²⁴ especially if it has been the custom to so receive messages. Where the party desiring to send a message is unable to write on the account of ignorance, or because he cannot see how to write, or when otherwise unable to write, the company should not refuse to serve him for this purpose, but the scope of the operator's agency under such circumstances should, it seems, be enlarged so as to devolve upon him the duty to perform this service.²⁵

§ 318. Messages not stamped—contributory negligence.

Where there is an act of Congress requiring all messages to be stamped, it is the duty of the sender to perform this duty and not that of the company.²⁶ So, if a telegraph company refuses to transmit a message because it has not been stamped, it will not be liable for such refusal, or for a penalty for a refusal to transmit such a message. If, however, the sender is ignorant of such an act, it seems that the company should inform him of same and state this as a reason for refusing to accept the message. While it is an old maxim that ignorance of law excuses no one, yet the operator, having knowledge of such a law and knowing that the sender does not have this

²³ *West. U. Tel. Co. v. Edsall*, 63 Tex. 668; *West. U. Tel. Co. v. Foster*, 64 Tex. 220, 53 Am. Rep. 754; *Gulf, etc., R. Co. v. Gur*, 5 Tex. Civ. App. 349, 24 S. W. 86. Compare *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394, 43 L. R. A. 280, 76 N. W. 762.

²⁴ *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394, 43 L. R. A. 280, 76 N. W. 762.

²⁵ *Id.*

²⁶ *West. U. Tel. Co. v. Hurley*, 157 Ind. 90, 60 N. E. 682; *Gray v. West. U. Tel. Co.*, 85 Mo. App. 123.

knowledge, should surely inform him of the reason for not accepting the message: and, in doing this, he necessarily must tell him of the law.

§ 319. Delay in sending—no contributory negligence.

A telegraph company cannot excuse itself from liability by claiming that the sender was guilty of contributory negligence in not delivering the message earlier to the company, instead of waiting until the last minute.²⁷ In determining this question, the fact must be considered as to whether or not the negligence of the company was the proximate cause of the loss; since, if it is not, the company will not be liable. The company may be guilty of negligence, but if it is shown that the sender failed to exercise reasonable care in this particular matter, wherein the company is guilty of negligence—or, in other words, where the sender is guilty of contributory negligence—he cannot recover.²⁸

§ 320. Injured party—should minimize loss.

When a telegraph company has been guilty of negligence in the transmission and delivery of its messages, whereby the plaintiff has been injured or has suffered loss, it is incumbent upon the latter to minimize the loss, if he can do so at a trifling expense or with reasonable exertion.²⁹ This is a principle of law which has been upheld by almost all the courts,³⁰ and which has been supported by the

²⁷ *Pope v. West. U. Tel. Co.*, 14 Ill. App. 531; *West. U. Tel. Co. v. Bruner*, 19 S. W. 149.

²⁸ *West. U. Tel. Co. v. Housewright*, 5 Tex. Civ. App. 1, 23 S. W. 824.

²⁹ *Miller v. Mariner's Church*, 7 Greenleaf 51, 20 Am. Dec. 341.

³⁰ *Alabama*.—*Dougherty v. West. U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435, 89 Ala. 191, 7 So. 660; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844; *West. U. Tel. Co. v. Crawford*, 110 Ala. 460, 20 So. 111; *West. U. Tel. Co. v. Chamblee*, 122 Ala. 428, 25 So. 232.

Georgia.—*West. U. Tel. Co. v. Reed*, 83 Ga. 401, 10 S. E. 919.

Illinois.—*West. U. Tel. Co. v. Hart*, 62 Ill. App. 120; *West. U. Tel. Co. v. North Packing, etc., Co.*, 188 Ill. 366, 58 N. E. 958, 52 L. R. A. 274, affirming 89 Ill. App. 301.

Indiana.—*West. U. Tel. Co. v. Briscoe*, 18 Ind. App. 22.

Iowa.—*Hasbrouch v. West. U. Tel. Co.*, 107 Iowa 160, 70 Am. St. Rep. 181, 77 N. W. 1034.

Kentucky.—*West. U. Tel. Co. v. Matthews*, 67 S. W. 349, 24 Ky. L. Rep. 3; *Postal Tel. Cable Co. v.*

public interest and sound morality.³¹ If the injured party fails to exercise reasonable diligence to make the loss as light as possible, he can only recover such damages as actually arise from the negligent act of the company, and not such as may have been minimized by a reasonable exertion on his part. It is not presumed that he knows of the company's negligence, but if he is informed of this fact, either directly or by circumstances which would lead him to inquire for such information, it is his duty to make the loss as light as possible, if he can do so at a small expense or by reasonable exertion. Thus, where a telegraph company fails to transmit a message, in which the plaintiff directs his agent to make a sale of certain property, it is the duty of the plaintiff, on discovering this fact, to use reasonable diligence in repeating the order to sell.³² But what his duty would be in any case depends upon the circumstances in the particular case at issue. The criterion is always what a reasonably prudent man would have done under similar circumstances,³³ and it is always in-

Schaeffer, 62 S. W. 1119, 23 Ky. L. Rep. 344.

Mississippi.—Shingleur v. West. U. Tel. Co., 72 Miss. 1030, 48 Am. St. Rep. 604, 18 So. 425, 30 L. R. A. 444.

Missouri.—Reynolds v. West. U. Tel. Co., 81 Mo. App. 223.

New York.—Leonard v. New York, etc., Electro Magnetic Co., 41 N. Y. 544, 1 Am. Rep. 446.

Tennessee.—Marr v. West. U. Tel. Co., 85 Tenn. 550, 3 S. W. 496; Pepper v. West. U. Tel. Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; West. U. Tel. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725.

Texas.—West. U. Tel. Co. v. Hoffman, 80 Tex. 420, 15 S. W. 1048, 26 Am. St. Rep. 759; Gulf, etc., R. Co. v. Loonie, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891; West. U. Tel. Co. v. Birdue, 2 Tex. Civ. App. 517, 21 S. W. 982; West. U. Tel. Co. v. Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70; West. U. Tel. Co. v. Jeans, 29 S. W. 1130, 88 Tex. 230, 31 S. W.

186; West. U. Tel. Co. v. Hill, 26 S. W. 252; West. U. Tel. Co. v. Davis, 35 S. W. 189; West. U. Tel. Co. v. Sorsby, 29 Tex. Civ. App. 345, 69 S. W. 122.

Virginia.—Wash., etc., Tel. Co. v. Hobson, 15 Gratt, 122.

³¹ Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330.

³² Dougherty v. American Union Tel. Co., 5 Am. & Eng. Corp. Cas. (Ala.) 203; Leonard v. Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; True v. Int. Tel. Co., 60 Me. 9, 11 Am. Rep. 156; N. Y. & W. Pr. Tel. Co. v. Dryburg, 35 Pa. St. 293; U. S. Tel. Co. v. Wenger, 262; W. & N. O. Tel. Co. v. Hobson, 15 Gratt. 122; West. U. Tel. Co. v. Ward, 23 Ind. 377; Tyler v. West. U. Tel. Co., 60 Ill. 421; West. U. Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 280.

³³ West. U. Tel. Co. v. Lydon, 82 Tex. 364, 18 S. W. 701; West. U. Tel. Co. v. Bryson, 25 Tex. Civ. App. 74, 61 S. W. 548; West. U. Tel. Co. v.

cumbent upon the company to show that this duty has not been performed.³⁴

§ 321. Presumed to perform contract.

Telegraph companies contract with their patrons for a valuable consideration to exercise reasonable care to transmit and deliver correctly and promptly all messages accepted by them, and it is presumed that they are carrying out their part of the contract. Therefore, it is not the duty of the sender to anticipate in this respect negligence of the company, nor is it his duty to exercise diligence to ascertain by inquiry from the company or otherwise as to whether or not the sendee has received the message correctly;³⁵ but it seems that if such a fact has come to his knowledge from a responsible source, it is his duty to inquire into the truth of such information. For instance, if it is clear on the face of an answer to a telegram that there is a mistake in the original, and on account of which loss may be incurred, it is the duty of the sender to inquire into the mistake in order that he may minimize the loss;³⁶ but if the loss has been incurred and there is no means by which it may be made lighter, it is not his duty to notify the company of the error made in the message.³⁷

§ 322. Should resort to other means when necessary.

When a sender ascertains the fact that the company has been guilty of negligence, he should resort to other available means of communication, if he thinks it would be impossible for the former to accomplish the purpose by a reapplication to it;³⁸ but if the party

Cain, 40 S. W. 624; Southwestern, etc., Tel. Co. v. Taylor, 26 Tex. Civ. App. 79, 63 S. W. 1076; West. U. Tel. Co. v. Matthews, 67 S. W. 849; West. U. Tel. Co. v. Lavender, 40 S. W. 1035; West. U. Tel. Co. v. Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367; Gulf, etc., R. Co. v. Loonie, 82 Tex. 323, 18 S. W. 221.

³⁴ Castigan v. Mohawk & Hudson R. Co., 2 Denio 609, 43 Am. Dec. 758.

³⁵ West. U. Tel. Co. v. Chamblee, 25 So. (Ala.) 234.

³⁶ Hasbrouck v. West. U. Tel. Co., 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 185; Beynur v. McBride, 37 Iowa 114; Greenleaf on Evidence, § 261.

³⁷ Rittenhouse v. Independent Line of Telegraph, 1 Daly (N. Y.) 474, 44 N. Y. 263, 4 Am. Rep. 673.

³⁸ Southwestern Tel., etc., Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686. But see West. U. Tel. Co. v. Wisdom, 85 Tex. 261, 20 S. W. 56, 34 Am. St. Rep. 805, 22 L. R. A. 483.

to whom the message is addressed is the plaintiff and the injured party, the company cannot set up the fact as a ground of defense that the sender failed to resort to these means.³⁹ If the sender cannot prevent the entire loss, but only lessen it, he will not be prevented from recovering all the loss, but only such as he might have prevented by reasonable exertions.⁴⁰

§ 323. Misinterpreting message—addressee.

If the message as received by the addressee is intelligible and not doubtful in its terms, he may act according to its intents; and should he have misinterpreted its meaning on account of an error made by the company, the sender cannot be defeated by the defense of contributory negligence on the part of the sendee.⁴¹ Thus, where a message was sent by a client to his attorney to attach a certain creditor for "seven hundred and ninety dollars," and when the message read as received "even hundred and ninety dollars;" it was held that the attorney was not guilty of contributory negligence in interpreting the message as meaning "one hundred and ninety dollars"⁴² But if there is anything in the message itself which would lead him to believe that an error had been made, or if there are any circumstances connected with it which, with reasonable prudence, would lead him to suspect that an error had been made, he will be guilty of contributory negligence if he fail to inquire into such information when the opportunity is afforded.⁴³ If, however, on suspecting an error he requests the operator to wire to the relay station to verify the message, and the same is done, he will have discharged his duty and will not be guilty of any negligence.⁴⁴ When the message is ambiguous, but

³⁹ West. U. Tel. Co. v. Wisdom, 85 Tex. 261, 20 S. W. 56, 34 Am. St. Rep. 805, 22 L. R. A. 483.

⁴⁰ Mitchell v. West. U. Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016.

⁴¹ West. U. Tel. Co. v. Beals, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682; Tobin v. West. U. Tel. Co., 146 Pa. St. 375, 20 Atl. 324, 28 Am. St. Rep. 802; Hasbrouck v. West. U. Tel. Co., 107 Iowa 160, 70 Am. St. Rep. 181, 77 N. W. 1034.

⁴² West. U. Tel. Co. v. Beals, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682.

⁴³ West. U. Tel. Co. v. Adair, 115 Ala. 441, 22 So. 73; Manly Mfg. Co. v. West. U. Tel. Co., 105 Ga. 235, 31 S. E. 156; West. U. Tel. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589.

⁴⁴ Efrid v. West. U. Tel. Co., 132 N. C. 267, 43 S. E. 825.

still the sendee acts on it, guessing at its intended meaning, he will be responsible for all losses occurring from his incorrect guessing. The company cannot even be held liable for his wrongful guessing;⁴⁵ and where the message is intelligible and unambiguous, it is a question of fact as to whether the sendee was misled in its meaning.⁴⁶ The nature of the telegram and the circumstances surrounding the sendee's position with respect to the business about which it was sent, should be considered by a jury in determining this question.⁴⁷ For, if he has had other communications respecting this business, or if he is familiar with it, his interpretation should be considered more carefully.

§ 324. Should read carefully—sendee.

It is the duty of the sendee of a telegram to read it carefully before acting thereon; and should he fail to do so, whereby loss is incurred which might have been avoided, or at any rate could have been minimized, had the message been considered with more care, he, and not the company, must suffer for such negligence.⁴⁸ It is very true that telegraph companies may be guilty of negligence in transmitting messages, but if the same is received, apparently intelligible, the sendee may safely act according to its terms; yet if there is any ambiguity in the message which could be easily observed by an ordinarily prudent business man by careful reading, the negligence of the company will be excused on account of the contributory negligence of the sendee. And again, these companies cannot be held liable for a loss caused by the sendee acting on a misinterpreted or vague message.⁴⁹ These companies endeavor to teach their patrons that brevity of their messages is the mainspring of the former's existence: it is better for the patron, in that it lessens his expenses; and it is to the interest of the companies, in that it enables them to do

⁴⁵ *Hart v. Direct U. S. Cable Co.*, 86 N. Y. 633; *De Rutt v. New York, etc., Electric Magneto Tel. Co.*, 1 Daly (N. Y.) 547; *West. U. Tel. Co. v. Neill*, 57 Tex. 292, 44 Am. Rep. 589.

⁴⁶ *Manly Mfg. Co. v. West. U. Tel. Co.*, 105 Ga. 235, 31 S. E. 156; *Has-*

brouck v. West. U. Tel. Co., 107 Iowa 160, 70 Am. St. Rep. 181, 77 N. W. 1034.

⁴⁷ *Id.*

⁴⁸ *West. U. Tel. Co. v. Harper*, 15 Tex. Civ. App. 37, 39 S. W. 599.

⁴⁹ *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026.

more work in a shorter time. But while this is the case, it is not to be understood that they have obligated themselves to write the message for the sender, nor to tell him how it should be written. This fact is attempted to be impressed on all who do business with them, and it is presumed that they know of this when they apply for service. The company, then, can only transmit such messages as may be presented to it for transmission and, if they are vague in anywise, it is not the duty of the company to inform either the sender or addressee of its vagueness, since it may appear to the former as being vague when it would not so appear to either of the other parties. But if it is vague to the sendee, he should use reasonable exertions to find out its meaning and, on failure to do so, whereby injury has been incurred, he will be charged with contributory negligence.

§ 325. Cause—proximate—remote.

In order that the injured party may recover for an alleged negligence of the company, it must be shown that the company's negligence was the proximate cause of the injury. While this is the undisputed principle of law in such cases, yet there has not been any rule laid down by which it may be determined as to whether or not the negligence is proximate or remote. In other words, there has not been nor can there be a line drawn separating the two, so that it may be said that it is a subject to be placed on one or the other side of this line, but the facts in each particular case must be considered in determining the question.⁵⁰ After the facts have been presented, they must then be sufficient to warrant a jury in finding that the negligence was the proximate cause of the injury; that is, facts and circumstances must be proved sufficiently to bring conviction to a reasonable mind, without resorting to mere conjecture or uncertainty, and mere presumption that the company's neglect of duty was the proximate cause of the injury.⁵¹ A jury must not, in determining

⁵⁰ *Hendershot v. West. U. Tel. Co.*, 106 Iowa 529, 76 N. W. 828, 68 Am. St. Rep. 313; *McPeck v. West. U. Tel. Co.*, 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; *West. U. Tel. Co. v. Simpson*, 64 Kan. 309, 67 Pac. 839; *Strahorn-Hutton-*

Evans Coms. Co. v. West. U. Tel. Co., 101 Mo. App. 500, 74 S. W. 876; *Higdon v. West. U. Tel. Co.*, 132 N. Car. 726, 44 S. E. 538.

⁵¹ *Hendershot v. West. U. Tel. Co.*, 106 Iowa 529, 68 Am. St. Rep. 313, 76 N. W. 828.

this question, indulge in conjecture, speculation, or guesswork, although they need not be convinced to an absolute certainty; if there is a preponderance of the evidence to the effect that negligence was the proximate cause of the injury, the jury is warranted in finding the company liable therefor.⁵² Thus, a delay of five hours in delivering a message, the importance of which was shown on its face, to a veterinary surgeon requesting his immediate attendance to treat a very valuable horse, was negligence on the part of the company; and if by a prompt delivery the surgeon would probably have gotten to the horse in time to have saved its life, then, the proximate cause of the death of the animal would be the delay in the delivery of the message.⁵³ Where the plaintiff informs the company that he is expecting to receive an important message and, after this information, the company delays the delivery of a telegram, whereby the plaintiff is defeated in capturing a fugitive from justice, and thereby loses the reward, the company's negligent delay is the proximate cause of the loss and it is, therefore, liable for so much thereof.⁵⁴ It must be shown that the prompt delivery would have prevented the loss; as, where a warning message, directed to a man who was being pursued, was not delivered, and the addressee was killed by his pursuers: it was held that there could be no recovery, since it did not appear that the prompt delivery of the message would have saved his life.⁵⁵

§ 326. Contributory—negligence—same rule.

The same rule, as above, will apply where the company attempts to set up, as a defense, the contributory negligence of the injured party. The plaintiff must use ordinary care in carrying out his business transactions with these companies, and if he fails to do so, which contributes proximately to the company's neglect, he cannot recover. While it is difficult to say as to whether or not the want of the injured party to use ordinary care has contributed proximately to the

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *McPeck v. West. U. Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205, 43 L. R. A. 214, 78 N. W. 63.

⁵⁵ *Ross v. West. U. Tel. Co. (C. C. A.)*, 81 Fed. 676; *Barnes v. West. U.*

Tel. Co., 24 Nev. 125, 50 Pac. 438, 74 Am. St. Rep. 791. In this case it was held that unreasonable delay in the delivery of a message was the proximate cause of an injury caused by being run over by rail-cars due to the injured party's negligence.

company's negligence, yet it may be said that it does contribute proximately to the injury when it is an active and efficient cause of the injury in any degree, however slight, and not the mere condition or occasion of it.⁵⁶ Thus, if in the case cited in the preceding section—where there was a delay of five hours in delivering the message to the surgeon—the injured party had learned of the delay and did not take other steps to get this or another veterinary surgeon, or did not attempt in other ways to save his horse, his neglect would have contributed proximately to that of the company's, and prevented recovery; but if the neglect of the company had been the more immediate cause of the injury, he may recover.⁵⁷ That is, if both the injured party and the company have been guilty of negligence, but that of the company is the more immediate cause of the injury, the company will be liable. On the other hand, if it appears that the

⁵⁶ Bigelow on Torts, 311; Beach on Con. Neg. 36; Wharton on Neg., § 303; Shearman & Reaf on Neg., § 33; *McHendrich v. Mississippi, etc., R. Co.*, 20 Iowa 338; *Murphy v. Deane*, 101 Mass. 455, 3 Am. Rep. 390; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Washington v. B. & O. R. R. Co.*, 17 W. Va. 190. In this case the court said: "Properly speaking, contributory negligence, as the very words impart, arises when the plaintiff as well as the defendant has done some act negligently, or has omitted through negligence to do some act which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury. On the contrary, if the act of the defendant is the immediate cause of the injury, no preceding negligence or improper conduct of the plaintiff would prevent him from recovering; for in such a case his preceding negligence or improper conduct would not be in law regarded as any part of the cause of the injury, and would not therefore be held to be contributory negligence. The plaintiff's

preceding negligence or improper conduct is in such case a mere condition, and not a cause of the injury. Though it may be in such a case, that the injury could not possibly have happened without this preceding negligence or improper conduct of the plaintiff, that is, without circumstances being in the actual condition in which the plaintiff had improperly placed them, he may in such case nevertheless recover; for in the view of the law, which now looks to the remote cause, which we have called a condition, but only the proximate cause, the injury in such a case would be held to be caused by the defendant only."

⁵⁷ *Manly, etc., Wilmington, etc., R. Co.*, 74 N. C. 655; *Kerwhacker v. Railroad Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; *Brown v. Hannibal, etc., R. Co.*, 50 Mo. 461, 11 Am. Rep. 420; *Pittsburg, etc., R. Co. v. Karns*, 13 Ind. 87; *Richmond, etc., R. Co. v. Anderson*, 31 Gratt. (Va.) 812, 31 Am. Rep. 754; *Zemp v. Wilmington, etc., R. Co.*, 9 Rich. L. (S. Car.) 84, 64 Am. Dec. 763.

injury would have nevertheless occurred had the company exercised ordinary care, the plaintiff cannot recover, however negligent the company may have been.⁵⁸ In other words, the act must have been caused by the negligence of the company unconnected with any fault of the plaintiff, and as a result of which the injury would not have been inflicted. And in all cases where the question is whether or not the alleged negligence is the proximate cause of the injury,⁵⁹ it is a question of fact to be decided by a jury.

§ 327. Evidence—wealth or poverty of either party—company.

It might be well to discuss at this place the admissibility of certain evidence touching on the wealth or poverty of either party to cases arising out of the company's negligence in the transmission and delivery of messages. It is a general rule of evidence that no evidence is admissible save such as is material, relative and pertaining to the allegations contained in the pleadings, and, in a case arising out of negligence, no facts can be alleged in the pleadings, as a general rule, except, such as are descriptive of the negligent act. The first question which presents itself under this subject is, whether or not the wealth or poverty of either of the parties should be shown in the case? As a general rule, the wealth of the company cannot be shown in a case arising out of its negligent acts. In the first place, it is not the wealth of the company that causes the negligent act, nor the injury arising therefrom; and for this reason the pleadings would be demurrable if such allegations were contained therein; and another reason would be, if this fact were allowed to remain in the bill as material, or if there were evidence admitted to this effect over the company's objections, it would have the tendency to prejudice the jury against the company. But if the negligent act of the company is alleged to have been willful, for which exemplary or punitive damages are claimed, the wealth of the company may be shown.⁶⁰ This kind of damages in the main are imposed on the company by way of

⁵⁸ *Ross v. West. U. Tel. Co.* (C. C. A.), 81 Fed. 676.

⁵⁹ *West. U. Tel. Co. v. Morris* (C. C. A.), 83 Fed. 902; *Wallingford v.*

West. U. Tel. Co., 60 S. C. 201, 38 S. E. 443.

⁶⁰ *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419.

punishment for its willful wrongs. In order to impose the proper punishment to meet the injury inflicted, the wealth of the company must be considered; for the greater the wealth of the latter, the greater must be the damages imposed. The most successful way of punishing these and other corporations for their willful wrongs, is by awarding damages against them for such wrongs, and the better remedy in deterring the commission of other and similar wrongs is by awarding damages in every case commensurate with their wealth.

§ 328. Same continued—party injured.

Where the plaintiff has lost a great bargain in a contract of sale of property, by the company negligently delaying a message concerning such sale, the evidence of the embarrassed financial condition of the sendee is not admissible.⁶¹ Neither could he show the condition of his family, nor his future prospects in other lines of business; but only such evidence could be admitted as pertained to the negligent act of the company. It seems, however, that where the negligent act has been willful, he may show his wealth and standing or reputation. Almost the same reasons may be given why the wealth or reputation of the plaintiff should be shown as those stated above, in the admissibility of evidence of the wealth of the company. Damages in the way of compensation for a willful wrong of the company to a man of limited means or of small reputation, would not be sufficient for a man of greater wealth or more extensive reputation. Therefore, in considering the amount of damages to be awarded for a willful act of the company in the transmission of messages intrusted to its care, the wealth or reputation of the plaintiff may be shown in order to arrive at a proper amount of damages.

§ 329. Declaration of agents.

The general principle of law with respect to the admissibility of statements and declarations of agents as against their principals, are applicable here. Therefore, statements or declarations of agents or employees of these companies are inadmissible as evi-

⁶¹ West. U. Tel. Co. v. Way, 83 Ala. 542, 4 So. 844.

dence against the company, unless the same is made while acting within the scope of their duties, at the time when the negligent act is alleged to have been committed, and is made with reference to such act. In other words, the declaration or statement must be part of the *res gestae*.⁶³ Thus, a statement made by an agent of a telegraph company is not competent as against the company, to prove that a message was not transmitted, when not made in the performance of any duty relating to its transmission.⁶⁴ But a statement that the message had not been delivered, made in answer to an inquiry, has been held to be admissible as a "part of the same transaction," and not relating to past occurrences.⁶⁵ Every statement or declaration of an agent of these companies, telling how the negligent act was committed, and made at or during the time of such commission, is admissible as being that of the company, to show how the same was committed. Thus, the statement of the company's messenger that he cannot find the addressee—who is the party injured—and made at the time he is looking for the addressee, is admissible against the company;⁶⁶ or any statement made by the messenger concerning the contents of the message, and which, it was claimed, the company wrongfully and negligently disclosed, and made at the time the messenger was delivering same, is admissible against the company to show that the contents of the message were negligently disclosed.⁶⁷

§ 330. Subsequent acts of company—of plaintiff.

Any act of the company made through its agents, and after the time the negligent act of the company is claimed to have been committed, and not connected with said negligence, cannot be shown against the company in an action against it for damages caused by such neglect. Thus, in an action against a telegraph company for negligence in the transmission of a message, evidence is inadmissible against the company to show that, because of the alleged negligence,

⁶³ *Sweetland v. Illinois, etc., R. Co.*, 27 Iowa 433, 1 Am. Rep. 285.

⁶⁴ *Aiken v. West, U. Tel. Co.*, 5 S. C. 358.

⁶⁵ *West, U. Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844.

⁶⁶ *Evans v. West, U. Tel. Co.*, 102

Iowa 219, 71 N. W. 219. See, also, *Garland v. West, U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; *West, U. Tel. Co. v. Lydon*, 82 Tex. 364.

⁶⁷ *West, U. Tel. Co. v. Bennett*, 1 Tex. Civ. App. 558, 21 S. W. 699.

one of its officers made a deduction from the pay of one of its operators.⁶⁸ Or, if one of the operators was discharged a few days after the negligent act; or, if new and different machinery or instruments were substituted for those in use at the time of the act, these facts could not be shown in evidence against the company in an action for the negligent act. But any subsequent act of the plaintiff toward the company, disconnected with the business transaction in which the negligent act is claimed to have been committed, yet in the furtherance of the consummation of such business, may be admitted to show the negligence of the company; as, where the sender sends a second message to the operator at the destination of the first message with instructions to deliver the first, this act of the plaintiff may be admitted to show the negligent delay in delivering the first.⁶⁹ And it has further been held, that evidence could be admitted to show that the plaintiff sent another message at the same time to the same place—but to another person—and received a reply to same, in order to show that the company was guilty of negligence in transmitting and delivering the first.⁷⁰

§ 331. Evidence of plaintiff's good faith—erroneous messages.

When a message has been erroneously transmitted and acted on by the plaintiff to his injury, any evidence as to his understanding of the message may be admitted for the purpose of showing his good faith in relying on it, as understood, and that he acted on the basis of that understanding. Thus the plaintiff, who receives in reply to a message to his stockholder a message stating the price of cattle, and buys according to his understanding of the message in such a way as to make a profit on them, may introduce, as evidence, the telegram received, to show whether or not the error was such as would lead a careful and prudent man to act thereon as he acted, and thereby to show his good or bad faith.⁷¹ And where the meaning of a telegram is couched in such terms as to be ambiguous to persons not engaged in the same business as that of the plaintiff, it may be explained by the

⁶⁸ *Cock v. West. U. Tel. Co.*, 36 So. (Miss.) 392.

⁶⁹ *Grinnell v. West. U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485.

⁷⁰ *West. U. Tel. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118.

⁷¹ *West. U. Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701.

testimony of the sender.⁷² Thus, evidence as to the price of goods in certain markets on a specified day, by a person who testifies that he knew the fact, is competent to go to the jury in the absence of evidence that he did not know such fact. The object in introducing such latter evidence is to prove that the price had advanced in the meantime, and that plaintiff was, therefore, obliged to pay a higher price than would have been necessary had the first message been sent promptly.

§ 332. Same continued—other cases.

In an action against a telegraph company for failure to deliver a message, if the defendant attempts to justify itself under the plea that the plaintiff was an obscure and unknown person, the latter may testify as to the nature of his business. He may tender and introduce in evidence business cards, letterheads, and envelopes (particularly after he has testified, without objection, that he so used them), for the purpose of showing that he had used the ordinary means of advertising himself, and that defendant, in the exercise of reasonable diligence, might have found some person who could give information as to his address.⁷³ Evidence of the proximity of the place of business and the residence of the plaintiff to the office to which the message was transmitted, and that it could have been forwarded to him from either place in time to prevent the loss, is competent.⁷⁴ Where the message, on which suit is brought for failure to deliver, was addressed to a physician, the company cannot introduce evidence in its defense that it was the custom of such physician not to make certain calls without prepayment of his professional charges.⁷⁵ Since it is not right for these companies to speculate on the chances that such summons will or will not be obeyed, they cannot, therefore, introduce evidence respecting such speculations.⁷⁶ Letters and statements of

⁷² Aiken v. West. U. Tel. Co., 69 Iowa 31, 58 Am. Rep. 210, 28 N. W. 419.

⁷³ West. U. Tel. Co. v. Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515n. See, also, Carland v. West. U. Tel. Co., 118 Mich. 369, 74 Am. St. Rep. 394, 43 L. R. A. 280, 76 N. W. 762.

⁷⁴ Gulf, etc., R. Co. v. Wilson, 69 Tex. 739, 7 S. W. 653.

⁷⁵ West. U. Tel. Co. v. Woods, 56 Kan. 737, 44 Pac. 989.

⁷⁶ West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

the addressee as to the reasons for his failure to purchase stock for the plaintiff, ordered by letter and telegram, have been held to be inadmissible in any action for failure to deliver the telegram.⁷⁷ When a telegraph company contracts to furnish an oil broker with accurate quotations of prices of oil, and to transmit his message for purchases and sales, he may show, when sued on the contract, the quotations furnished and directions given in reliance thereon.⁷⁸ And his testimony as to purchases and sales made under such directions, at places where he was not personally present, is admissible, and cannot be excluded under the rule requiring the production of the best evidence, as the purpose of the rule is to exclude evidence merely substitutional in its character.⁷⁹ On failure to deliver a message, it is not error to exclude evidence which shows that the message was sent by telephone, where it was not delivered.⁸⁰

⁷⁷ West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728.

⁷⁸ U. S. Tel. Co. v. Wenger, 55 Pa. St. 262, 93 Am. Dec. 751.

⁷⁹ West. U. Tel. Co. v. Stevenson, 128 Pa. St. 442, 15 Am. St. Rep. 687, 5 L. R. A. 515, 18 Atl. 441.

⁸⁰ West. U. Tel. Co. v. Jones, 13 So. (Miss.) 471.

CHAPTER XV.

LIABILITIES AS AFFECTED BY RULES AND REGULATIONS

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§ 333. Right to make reasonable regulations—in general.

It gives us pleasure to discuss, at some length, the right of telegraph companies to make reasonable regulations for the purpose of conveniently performing their duties toward the public and the effect they have upon their rights and liabilities. It is an unquestionable fact that these companies have the same right as any other corporation or private individual, to prescribe, adopt and enforce all reasonable rules and regulations for the purpose of conveniently discharging their duties.¹ In fact, it would be impossible for them to

¹Hewlett v. West, U. Tel. Co., 28 Fed. 181; True v. International Tel. Co., 18 Md. 341, 81 Am. Dec. 607; Co., 60 Me. 9, 11 Am. Rep. 156; Birney v. New York, etc., Printing Tel. Co., 18 Md. 341, 81 Am. Dec. 607; West, U. Tel. Co. v. Neal, 86 Tex. 368.

carry on their business with any amount of safety, either to themselves or to those with whom they may deal without clothing themselves with these rights, with which all must comply. It may be said that it is one of their inherent rights, by means of which they may perform and carry out the objects for which they were incorporated. There is a limit, however, to the extent to which they may exercise these rights. They, being institutions having a legal entity and thereby assuming public functions, cannot prescribe and enforce a rule which would release them from liability for any act of negligence of their servants or employees;² nor would any of their regulations be binding which would infringe upon public policy, or be in conflict with the general principles of the common law; and yet they may limit to a certain extent their common-law liability.³ It has long been a controverted fact as to whether or not they could enforce a rule against one of their patrons who had no knowledge of the existence of such a rule; but a number of these rules which we are specially discussing are to be found in full on the blank forms furnished to their customers, and on which messages are required to be written. When the fact of the knowledge of these particular rules is in question, it is presumed that the patron has knowledge of, and gives his assent to them, when he signs the telegram. He will be bound by any other rule or regulation of which he has knowledge, or of which he is presumed to have knowledge, and to which he has directly or indirectly assented.⁴

§ 334. Must be reasonable.

The rules and regulations adopted by these companies must be reasonable and not such as would relieve them of the obligations

25 S. W. 15, 40 Am. St. Rep. 847; West. U. Tel. Co. v. McMillan, 30 S. W. 298; Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 437; West. U. Tel. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 713; West. U. Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744.

²True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 156; Hibbard v. West. U. Tel. Co., 33 Wis. 558, 14 Am. Rep. 775; Bartlett v. West. U.

Tel. Co., 62 Me. 209, 16 Am. Rep. 437; Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38, 74 Ill. 168, 24 Am. Rep. 279. But see contra Grennell v. West. U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Becker v. West. U. Tel. Co., 11 Neb. 87, 38 Am. Rep. 356, 7 N. W. 867.

³True v. International, etc., Tel. Co., 60 Me. 9, 11 Am. Rep. 156.

⁴Id.

which law and public policy imposes.⁵ They have become one of the most important factors in the commercial world, by means of which the most important business transactions are being consummated and with far greater celerity than by any other means or device known. They, having placed themselves before the people as public servants, always ready and willing to be the means or instruments of performing with reasonable diligence and care and within the shortest possible time, all such business as may be intrusted to them, should for this reason provide themselves with proper instruments and skilled operators. The public may, and does, regulate many other affairs respecting the manner in which they shall construct and manage their business; but it is not within its power to say who shall operate and control the management of telegraph instruments; and yet it may prohibit these companies from enforcing regulations which tend to relieve them from liabilities caused by negligent acts of such operators. With respect to who shall operate the instruments in transmitting messages, the sender is wholly and entirely at the mercy of the company. And further, messages which are to be sent on these lines are, as a general rule, prepared and delivered to the company on very short notice, and it becomes the most earnest desire of the sender that they be immediately transmitted and promptly delivered; for, in them, much may be at stake, and so a failure to make haste and diligent effort to deliver them at their destination, might mean financial ruin, or even a greater loss, to either the sender or he to whom the message is addressed. Then, to say that these companies may relieve themselves from all or any of these responsibilities, when the public is at the mercy of them in this respect, and at a time when it perhaps would not be in a condition to refuse openly to assent to such rules and regulations would be unjust and therefore against public policy.⁶ The effect of these regulations, with respect to these companies attempting to enforce them against any particular individual who may apply to the former for their services, is not limited

⁵ *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *West. U. Tel. Co. v. Griswold*, 37 Ohio St. 313, 41 Am. Rep. 500; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Gillis v. West. U. Tel. Co.*, 61 Vt.

461, 15 Am. Rep. 917, 4 L. R. A. 611n, 17 Atl. 736.

⁶ *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715.

to such person; but they also affect the public, and are therefore against public policy, because they take from the public a part of the security it otherwise would have.⁷

§ 335. Must be reasonably applied.

These rules and regulations must not only be reasonable, generally, but they must be such as can be reasonably applied, under the special circumstances of any particular case, and while they may ordinarily be reasonable, yet they may operate unreasonably in a particular case;⁸ so, in such a case, they will not be enforced. As was very ably said by an eminent court, while discussing this point: "Reasonable regulations of public corporations like these must be reasonably applied, and a rule which is generally fair, may, under special circumstances, become oppressive and unreasonable as applied in the particular case; and so these corporations must exercise ordinary prudent discretion in relaxing their regulations."⁹ This is ably illustrated by Judge Hammond, in a case arising out of the unreasonableness of a regulation requiring a prepayment of the charges for an answer to a telegram, sent by a poor person, who notified the company of his destitute circumstances. In a case of this nature, the court held that this rule should be relaxed and not enforced as where the sender were able to prepay for the answer.¹⁰

§ 336. Same continued—reasonableness—who should decide.

After considering the fact that these companies may prescribe, adopt and enforce all necessary rules and regulations for the convenient performance of their duties, and that the same to be binding must be reasonable, the question which necessarily follows is, Who must determine the reasonableness of these rules and regulations? These companies, surely, cannot say that they are or that they are not reasonable;¹¹ then, it should be decided either by the court or by a jury, or by both. Some courts have held that it was a question of

⁷ *Telegraph Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 509.

⁸ *Hewlett v. West. U. Tel. Co.*, 28 Fed. 181.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *True v. International Tel. Co.*, 60 Mo. 9, 11 Am. Rep. 160.

fact to be decided by a jury.¹² But it seems that this should be a question of law for the court to decide, if any fixed and permanent regulations are to be established; and the better authorities are in accord with this holding, for the reason that a jury in one case may hold a certain rule reasonable, while another jury in another case might hold the same rule unreasonable.¹³ The circumstances in no two cases are always similar throughout. And so, where the facts pertaining to the rule in question are in dispute, some courts hold that the question of the reasonableness of the rule is a matter for the jury under proper instructions from the court, as a mixed question of law and fact, and that it is never a question for the court except when the facts are undisputed.¹⁴ We are inclined to believe that the latter holding is the correct one. That is, when the reasonableness of the rule depends, in the particular instance, upon disputed facts, it is a mixed question of law and fact; but if the facts are not disputed, it is clear, both upon principle and according to the weight of authority, that the question is one of law for the court.¹⁵

§ 337. Distinction between by-laws and rules and regulations or resolutions.

In this country, there is clearly a distinction between the by-laws of the company—which are adopted for the purpose of regulating and controlling the business affairs of the company with its servants and employees, and which can only be adopted by the stockholders or by the directors, when this right is delegated to them—and the rules and regulations which are adopted, generally, by some officer or servant of the company to be enforced against all who apply to it for

¹² State v. Overton, 24 N. J. L. 435; Morris, etc., R. Co. v. Ayres, 29 N. J. L. 393; State v. Choven, 7 Iowa 204; Tex., etc., R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666; Prather v. Railway Co., 80 Ga. 427, 9 S. E. 530; Heimann v. West. U. Tel. Co., 57 Wis. 562, 16 N. W. 32.

¹³ Com. v. Power, 7 Met. (Mass.) 576; Pittsburg & R. Co. v. Lyon, 123 Pa. St. 140, 10 Am. St. Rep. 517, 2 L. R. A. 489, 16 Atl. 607.

¹⁴ Id.

¹⁵ St. Louis, etc., R. Co. v. Hardy, 55 Ark. 134, 17 S. W. 711; Old Colony R. Co. v. Tripp, 147 Mass. 35, 17 N. E. 89; Louisville, etc., R. Co. v. Fleming, 14 Lea. (Tenn.) 128; Wolsey v. Railroad Co., 33 Ohio St. 227; Hoffbauer v. Railway Co., 52 Iowa 342, 3 N. W. 121; Shepherd v. Gold, etc., Tel. Co., 38 Hun (N. Y.) 338; Smith v. Gold, etc., Tel. Co., 42 Hun (N. Y.) 154.

services, for the purpose of convenience and safety, both to the company and its patrons. A by-law is adopted, specially, for the internal management of the company, and can only be enforced against the company and its employees, and those who transact business with the former, with notice of such. The rules and regulations, on the other hand, are adopted, more especially for the external management of the company, and can be enforced, when reasonable, against all who do business with it.¹⁶ These rules and regulations are not to be understood as meaning the same thing as resolutions passed by the company, in that the latter is merely an act of temporary enforcement against some particular object or person. They are adopted not to be enforceable against the public, generally, at all times, but are passed at some of the directors' meetings as a temporary enforcement against some particular person or thing.¹⁷

§ 338. Same continued—particular regulations.

Should the company adopt a rule providing for all messages to be delivered to it in writing, the same would be reasonable; and, should the company refuse to accept the message for this reason, it would not be liable for any injury caused by the message not being transmitted.¹⁸ However, if the company were to accept the message, and be paid for its transmission; or if it had been in the habit of receiving oral messages—or messages over the telephone¹⁹—for transmission, and refuse to transmit, it would be liable for any injury arising thereby.²⁰ The message should be fully and clearly written,²¹ without the use of numerals, when delivered to the company, and in the language prevailing at the place where the contract is made: since the company has no right to change the message,²² so as to make it clearer, and that, too, at the request of the sender.²³

¹⁶ *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671; *Morris, etc., R. Co. v. Ayres*, 29 N. J. L. 393; *Com. v. Power*, 7 Met. 596.

¹⁷ 10 Cyc., p. 350.

¹⁸ *West. U. Tel. Co. v. Wilson*, 9 So. (Ala.) 415; *Cumberland Tel. Co. v. Sanders*, 35 So. (Miss.) 653.

¹⁹ *Texas, etc., Tel. Co. v. Sieders*, 29 S. W. 258.

²⁰ *West. U. Tel. Co. v. Dozier*, 7 So. (Miss.) 325.

²¹ *Primrose v. West. U. Tel. Co.*, 9 Am. R. & Cor. Rep. 722.

²² *Pegram v. West. U. Tel. Co.*, 100 N. Car. 28, 6 S. E. 770, 6 Am. St. Rep. 557.

²³ *West. U. Tel. Co. v. Foster*, 64 Tex. 220, 53 Am. Rep. 754.

The company may require that the messages shall not only be written legibly but that they shall not contain any immoral or indecent language;²⁴ nor be such as would subject the company to an action of libel or to a criminal prosecution. If the message relates to any gambling contract, the company may refuse to accept it for transmission and any rule adopted by such company, whereby it is prescribed that such messages shall not be accepted, is reasonable. But a company acts upon its peril when it refuses to accept such messages, and should it be mistaken or misjudge the tenor or purposes of the messages, it will be held responsible to the injured party for any damages sustained by reason of a refusal to accept them.²⁵ Every message should have the signature of the sender, yet it has been held that a company could not enforce a rule that all messages tendered for transmission shall bear the autograph signature of the sender, unless a power of attorney from him is produced. This holding, however, was in a case in which the message was tendered by a connecting line,²⁶ and in view of the fact that these companies are often liable for forged messages, it may be well to question whether it may not enforce such regulation.²⁷

§ 339. Information as to meaning of message—can not demand.

Where a message is ambiguous on its face, the company cannot demand of the sender that it be informed of the nature and purport of the message. It cannot, therefore, enforce a regulation which provides that the patrons shall inform its operators of the true meaning of every message tendered it for transmission.²⁸ The messages must be clearly and legibly written out, and this is all that is necessary in order for the operator to be able to transmit it in the language in which it is tendered. It is not necessary for him to know the meaning of the message to be able to transmit it correctly. "A regulation of this description would simply seek to pry into, without cause, the

²⁴ *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495; *Archambault v. Great Northwestern Tel. Co.*, 14 Quebec 8.

²⁵ *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483.

²⁶ *Atlantic, etc., Tel. Co. v. West. U. Tel. Co.*, 4 Daly (N. Y.) 527.

²⁷ *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495.

²⁸ *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495, approved in *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 27 Am. St. Rep. 257, 14 L. R. A. 95, 13 S. E. 562.

private affairs of those who wish to employ the company, and, in its tendency to check the unreserved communication of intelligence by telegraph, would be peculiarly inconsonant with public policy.”²⁹ If the company should be subjected to a civil action, or to a criminal prosecution, for transmitting certain messages, and if it should be in doubt as to whether or not a certain particular message tendered for transmission would subject it to one of these actions, and as the company could not demand information of the meaning, the doubt should be construed in favor of the company, since to hold otherwise, would often place these companies in an unpleasant attitude. So no rule laid down by the company can be so stringent and enforceable, as that the parties could be compelled to divulge the meaning of such message; this being the case, the company should receive the benefit of every ambiguous telegram. The company may have this right against the sender of a meaningless telegram, where he fails to inform its agent of its meaning. And if the company is guilty of negligence in the transmission and delivery of such a message, whereby injury has been incurred, the injured party could only recover nominal damages.³⁰ So, it might be better on the part of the sender, to voluntarily give such information, even when he cannot be compelled by the company to do so.

§ 340. Delivery at company's office—reasonable.

A telegraph company may provide in its regulations that all messages shall be delivered at one of its transmitting offices.³¹ According to such regulation, a delivery to one of the company's messengers is not a delivery to the company, unless it has been the custom of the latter to consider this as a proper delivery. In such cases, the messenger acts as agent for the sender, in that particular matter, and not for the company.³² The company, doubtless, is better posted about the working order of its lines and its ability to transmit messages intrusted to it, and the sender, on the other hand, is of course, better informed as to the contents of the message; should there be

²⁹ Gray on Tel., p. 24.

³⁰ See title, "Message in cipher or otherwise unintelligible."

³¹ Stamey v. West. U. Tel. Co., 92

Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1008.

³² West. U. Tel. Co. v. Ferguson, 57 Ind. 495.

any ambiguity on the face of the message, the latter could, if he were at the transmitting office, make clear the ambiguities, and thereby aid and assist the operator materially in making a correct transmission. If the company could be forced to accept the message as given to its messenger, it could not, of course, have him present to explain the meaning of the message; and yet it would be under obligation to transmit it in its ambiguous state.³³

§ 341. Prepayment of charge—reasonable regulation.

A regulation of these companies, which provides that the sender shall prepay all the charges for transmitting and delivering messages,³⁴ is reasonable and enforceable. In this respect, these companies are similar to common carriers of passengers, in that each may exact of its patrons a prepayment of a reasonable compensation for the service which they hold themselves out to the public as ready and willing to perform. These are the considerations they obligate themselves to accept, in lieu of their respective public duties assumed. Like all other contracts, this consideration may be either a subsequent or a precedent condition to the performance of such contract; and whether or not the condition is either precedent or subsequent depends, as in other contracts, upon the custom of the companies or upon the expressed agreement to that effect. The consideration of a contract for the transmission of a telegram is generally made with respect to the company's rules and regulations to that effect. An expressed stipulation, which provides that this consideration shall be a condition precedent to the performance of its duty—and all who apply to such companies for services are presumed to have notice of such a condition—must be complied with, before the company can be forced to accept the message for transmission. The main ground on which this reason is founded is that they may be instrumental in preventing these companies from suffering a probable loss. When parties to a telegram are so much interested in a business affair as to seek the aid of a telegraph company—which is not interested in the

³³ Gray on Tel., § 13.

³⁴ Langley v. West U. Tel. Co., 88 Ga. 777, 15 S. E. 291; Harkness v. West. U. Tel. Co., 73 Iowa 190, 34 N. W.

811, 5 Am. St. Rep. 672; Smith v. West. U. Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

results of the message—to assist them in consummating their business arrangements, it is more reasonable for the company to demand a payment of the charges for its assistance before the same is rendered; furthermore, it is easier to collect, then, than it would be after the services have been rendered and after the interested parties have accomplished their desired purposes. In other words, if the sender has a hesitancy in prepaying the company for its services rendered in transmitting a telegram—and in the performance of which the former, doubtless, is much more interested, than the latter—surely he will have a much greater hesitancy in paying for same after the purposes of the telegram have been accomplished and possibly, too, at his loss.³⁵

**§ 342. Extra charges for delivering beyond free-delivery limit—
not always reasonable.**

It has been held by some courts that a rule of a telegraph company which required an extra deposit by the sender, or a guaranty of same, to pay for the delivery when the addressee lived beyond the free delivery limit, was reasonable, whether or not the sender knew of the addressee's residence with respect to the distance from the central office of the company.³⁶ We agree with these authorities that this is a reasonable rule and that the company may exact of the sender an extra deposit for this extra service; provided, the sender knew that the addressee lived beyond the free delivery limit, otherwise it would not be. This point was most ably discussed by Judge Gavin, and it gives us much pleasure to quote what he has to say in the note below.³⁷

³⁵ Gray on Tel., § 13.

³⁶ West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

³⁷ "Such a regulation as we are now considering would, as it seems to us, be harsh, inequitable, and unnecessary. When the patron pays to the company the amount which he believes, in good faith, covers the entire charge for the service, and the company receives it and the message, he has a right to ex-

pect that the company will carry the message to the person addressed, if within the statutory delivery limits, and present it for delivery. If there be then an additional sum due, the company may require its payment before it surrenders the message to the sendee, if it prefers to do so rather than rely solely upon the sender for its payment. The company will thus be furnished ample protection, and the expectations and purposes of the send-

§ 343. Deposit for answer—not always reasonable.

As a general rule, a regulation, which imposes the duty upon a transient person to deposit a sufficient amount of money with the company to pay for as many as ten words in answer to his telegram, is reasonable; yet there may be some few exceptions to the rule. The reason of the rule, in one case, was based on the ground that it was a matter of social etiquette, due by the sender to the addressee, that the former pay for the answer to his telegram.³⁸ While this courtesy should be extended to the addressee, especially when these telegrams are concerning the business of the sender, yet this is no reason why these companies should, by their regulations, enforce the laws of social etiquette.³⁹ Almost the same reason given for holding that the company may exact of the sender a prepayment of the charges for transmitting the original message, may be applicable here. The natural inference is, that where the original telegram demands an answer to the business matter about which it relates, is of more interest to the sender than it is to the addressee, a transient man with the likelihood of being at another place when the answer is received and at a place where it could not conveniently be delivered, the company would probably lose the charges for the answer, and for this reason the company may enforce this regulation. But suppose the transient person desires that the answer be sent to another place, or over another line; or, suppose he is a tramp or a person in destitute circumstances of the message will not be disappointed.

This course seems to use to afford a much fairer and more equitable solution of the problem as to what is the duty of the company than to hold that it may stop the message half way upon its course, and thus really render to the sender no service, after receiving from him what both thought to be the full price therefor. We apprehend that, if such a course were followed, there would be few instances where the sendee would refuse to receive the message, and pay the delivery charge, if proper.

If he did, a notification to the send

er would, in the most of those few instances, bring the money from him. If, however, the company might occasionally lose a delivery charge, the loss to it would be trifling and inconsiderable when compared with the possible loss and inconvenience to the public and patrons who have relied in good faith upon their delivery of the message." *West. U. Tel. Co. v. Moore*, 12 Ind. App. 136, 54 Am. St. Rep. 519.

³⁸ *West. U. Tel. Co. v. McGuire*, 104 Ind. 130, 54 Am. Rep. 296, 2 N. E. 201.

³⁹ *Hewlett v. West. U. Tel. Co.*, 28 Fed. 181.

ees, which acts are made known to the company's operator. Is it then presumed that these regulations, under such circumstances, would be reasonable? Most assuredly they would not. In the first instance, it would be an act of courtesy which the company would owe its patron: in the second, it would be something in the nature of an act of charity, which the company, however being a person only in the contemplation of law, owes to the poor and wayfaring; and, in either instance, the operator should not refuse the request of such persons.

§ 344. May waive prepayment.

While a company may enforce the rule prescribing a prepayment of the charges, yet if it accepts a message without a prepayment, and without notifying the sender of such rule, it is, nevertheless, under obligations to the former to transmit and deliver the message; and on a failure so to do, the company cannot use this as a defense in an action against it for a negligent transmission.⁴⁰ And should a company accept a message for transmission with the understanding that the charges would be afterwards paid, it is compelled to send the message, notwithstanding the fact that it has a rule prescribing a prepayment of the charges, and one which the operator could not in anywise disregard.⁴¹ The court held, in a case in which the sender was an employee of the company, that it was duty bound to transmit his message and was liable for a failure to so do, even though the company offered to show that the service of the company was gratuitously tendered.⁴² The ground on which these rights are based is, that it has waived all rights it may have had.

§ 345. Regulation of office hours.

Telegraph companies have the right to make reasonable regulations as to the time during which their offices shall be open for the dispatch

⁴⁰ West. U. Tel. Co. v. Cunningham, 99 Ala. 314, 14 So. 579.

⁴¹ West. U. Tel. Co. v. Snodgrass, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851.

⁴² West. U. Tel. Co. v. Snodgrass, 94 Tex. 284, 60 S. W. 308, 86 Am. St.

Rep. 851. See, also, Glovis v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675; Gray v. Merrian, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172. 32 L. R. A. 769n; Hiberiva Bldg. Assn. v McGrath, 154 Pa. St. 296, 26 Atl. 377, 35 Am. St. Rep. 828.

of business.⁴³ As a general thing, such rule will be as convenient and beneficial to the public as to the companies. While it might incommode some persons, at some particular time, to enforce such a regulation, yet as a general convenience to the public it would be better for the rule to be imposed, since not to do so would necessitate the company increasing its working force, and thereby increase the expenses for carrying on the business—which would have to be borne indirectly by the public. As was ably said on this subject: "It may be to the interest of some individual, upon a particular occasion, or even at all times, that every office of a telegraph company should be kept open at all hours, and that the working force should be sufficient to receive and deliver a dispatch without a moment's delay. So, also, it may be to the interest of a very few that an office should be kept at some point on the line where an office could not be maintained in any way without a loss to the company. If in the first instance the company should be required to keep the necessary servants to keep its business going at all hours, it would result in the necessity of closing many offices or in the imposition of additional charges upon its customers in general, in order to recoup the loss incident to their being maintained. So, on the other hand, if they should be required to keep offices wherever it might result to the convenience of a few persons, additional burdens upon the general public would in like manner result."⁴⁴ It being conceded that these companies may enforce these regulations, they will not be liable for any injury caused by a failure to deliver a message received by their operators at a time when the office at the other end of the line is closed; but if this latter

⁴³ *United States*.—*Given v. West. U. Tel. Co.*, 24 Fed. 119.

Georgia.—*West. U. Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444, 21 S. E. 835; *Boteman v. West. U. Tel. Co.*, 97 Ga. 338, 22 S. E. 920.

Indiana.—*West. U. Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172.

Kentucky.—*West. U. Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366.

Maryland.—*Berney v. New York, etc., Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607.

Rhode Island.—*Sweet v. Postal Tel., etc., Co.*, 22 R. I. 344, 47 Atl. 881.

Texas.—*West. U. Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; *West. U. Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394; *West. U. Tel. Co. v. Gibson*, 53 S. W. 712; *Womack v. West. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614.

West Virginia.—*Davis v. West. U. Tel. Co.*, 46 W. Va. 48.

⁴⁴ *West. U. Tel. Co. v. Neel*, 86 Tex. 368, 40 Am. St. Rep. 847.

office should receive the message after the closing hours, and when the messengers have retired from services, the company could not set this regulation up as a defense to an action brought against it for a failure to deliver, if the message showed on its face the necessity of an immediate delivery. Thus, where a message is received after office hours, requesting the sendee to meet a corpse at the place to which it is to be shipped and at the place to which the message is addressed at a time prior to the opening of the latter office, it is the duty of the company to deliver the message.⁴⁵

§ 346. Same continued—statutory penalty for delay—hours not the same.

In some states there are statutes which impose a penalty on these companies for a failure to promptly transmit and deliver a message, but it is understood that this penalty cannot be enforced unless the message is delivered to the company during office hours; and this means the office hours at each end of the line, provided they are reasonable. It may be, therefore, inferred from this statement that the office hours of all the company's offices are not the same, and it is this fact which we intend to impart. If it were required that the office hours should be the same, this of itself would destroy the fundamental reason for the enforcement of such a rule; since the business of some of the offices is much greater than that of others, and it would, therefore, be necessary, under such a condition of affairs, for these particular offices to be kept open longer than others. Most often, in cities, it is necessary that they be required to be kept open all the time. So, to require all of the offices to have the same hours would, as the reader will clearly see, destroy the reasonableness of the rule.⁴⁶

§ 347. Reasonableness of the rule.

The reasonableness of this regulation with respect to any particular office, depends largely upon the locality of the office and the amount

⁴⁵ West. U. Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843.

⁴⁶ West. U. Tel. Co. v. Harding, 10 Am. & Eng. Corp. Cas. 617.

of business done at that place.⁴⁷ Ten hours a day has been held to be a reasonable time during which to keep the office open in a town of only a few thousand people;⁴⁸ and when the business of a town is not sufficiently large to justify the employment of a special messenger, a regulation that telegrams received after seven o'clock in the evening will not be delivered until the next morning, is reasonable.⁴⁹ The burden is on the company to show that the office hours are reasonable;⁵⁰ and while it has been held that the reasonableness of the time was a question for the court, yet, the sounder holding is that it is a mixed question of law and fact.⁵¹ The time, where there has been no definite hours fixed, may be made with reference to the quantity of business of that particular office;⁵² and it is a question for the jury as to what the office hours were. So evidence is admissible to show what hours had usually been observed at the office in question.⁵³

§ 348. Same continued—waiver of regulations.

While a telegraph company may fix its office hours, and is not liable for a failure to deliver a message which has been received after this time, yet if it continues to hold open for business after the usual time for closing, it cannot set this up as a defense to an action of negligence claimed to have been committed in the transmission and delivery of a message. A general principle of the law of agency is, that the principal is liable for all acts of the agent done within the apparent scope of his duties, provided, the party injured by such act has no knowledge of the agent's duties. It is within the apparent scope of the operator's duties to extend the hours fixed for his

⁴⁷ *Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963; *West. U. Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74, 61 S. W. 548; *West. U. Tel. Co. v. Rawls*, 62 S. W. 136; *Brown v. West. U. Tel. Co.*, 6 Utah 219, 21 Pac. 988; *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026; *Hiemann v. West. U. Tel. Co.*, 57 Wis. 562, 17 N. W. 401.

⁴⁸ *West. U. Tel. Co. v. Gibson*, 53 S. W. 712.

⁴⁹ *Davis v. West. U. Tel. Co.*, 66 S.

W. 17, 23 Ky. L. Rep. 1758; *West. U. Tel. Co. v. Sternbergen*, 107 Ky. 469, 54 S. W. 829; *West. U. Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963.

⁵⁰ *West. U. Tel. Co. v. Luck*, 40 S. W. 753.

⁵¹ See page 245.

⁵² *West. U. Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366.

⁵³ *West. U. Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74, 61 S. W. 548.

office; and any one doing business with the agent with the belief that he is acting within his apparent authority, may hold the company liable for any injury arising out of such act.⁵⁴ Thus, it is within the apparent scope of the agent's authority to undertake the delivery of a message after office hours; and if he does so, he is bound to exercise due diligence to make a prompt delivery.⁵⁵ These regulations are not waived where the operator in accepting a message, expressly informs the sender that he does not know of the office hours of the office at the other end of the line, but will make an effort to deliver; such an acceptance does not amount to a special undertaking to transmit without reference to office hours prevailing at the latter office.⁵⁶ So, a mere agreement of the agent to use his best efforts to effect an immediate transmission will not render the company liable where its receiving office is closed pursuant to established office hours.⁵⁷ The failure of the operator to observe the office hours, when habitual, may be shown in evidence as indicating that no rule on the subject prevailed or was enforced; but proof merely of an occasional transmission or delivery after the office hours will not be sufficient to establish a waiver of the regulations.⁵⁸

§ 349. Employees need not be informed of other office hours.

It is not the duty of the operators at any receiving office to know the hours of any other office of the company.⁵⁹ The immense number

⁵⁴ *Dowdy v. West. U. Tel. Co.*, 124 N. C. 522, 32 S. E. 802; *West. U. Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74, 65 S. W. 548; *West. U. Tel. Co. v. Pearce*, 70 S. W. 361.

⁵⁵ *McPeck v. West. U. Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205, 43 L. R. A. 214, 78 N. W. 63.

⁵⁶ *Dowdy v. West. U. Tel. Co.*, 124 N. C. 522, 32 S. E. 802; *West. U. Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74, 65 S. W. 548; *West. U. Tel. Co. v. Pearce*, 70 S. W. 361.

⁵⁷ *McPeck v. West. U. Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205, 43 L. R. A. 214, 78 N. W. 63.

⁵⁸ *West. U. Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963; *West. U. Tel. Co. v. McConico*, 27 Tex. Civ. App. 610, 66 S. W. 592.

⁵⁹ *Given v. West. U. Tel. Co.*, 24 Fed. 119; *West. U. Tel. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *Sweet v. Postal, etc., Tel. Co.*, 22 R. I. 344, 47 Atl. 881; *West. U. Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; *West. U. Tel. Co. v. McConico*, 27 Tex. Civ. App. 610, 66 S. W. 592; *Stevenson v. Montreal Tel. Co.*, 16 N. C. Q. B. 559; *Thompson v. West. U. Tel. Co.*, 32 Mo. App. 197.

of these offices all over the United States, the frequent changes among them, and the time of closing seems to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers for neglect, and for which it should be held liable in damages. Furthermore, there is no more obligation to do this in regard to offices in the same state than in those four thousand miles away; since the communication is between them all and of equal importance.⁶⁰ And where the operator has habitually kept the office open, after the established hours, this will not deprive the company of the benefit of the regulation.⁶¹ It has been held, however, that if the message has been accepted by the company at a time when the office at the other end was closed, it would nevertheless be liable for a failure to transmit and deliver same;⁶² but this was a case where the message showed on its face the importance of an immediate delivery.

§ 350. Office hours as affects company's duty—night message.

Where a telegraph company has fixed certain hours within which all business transactions should be consummated, it is under no obligation to receive, for transmission, any message outside of such office hours; but if it should receive a message, at a time when the office at the other end of the line was closed, it may transmit the message within a reasonable time after the opening of the latter office.⁶³ Such state of facts very often happens where the message is received by the company after the terminal office has closed for the night, and it is invariably held that the message may be transmitted within a reasonable time after the office has opened on the following morning. If, however, the office at the other end of the line is only open for the receiving of messages, and the general messenger boys have retired from service, the company will, nevertheless, be under obligations to deliver the message, if the sendee prepays extra charges for the delivery of a night message. It is very often the case that the sender pays

⁶⁰ *Given v. West. U. Tel. Co.*, 24 Fed. 119.

⁶¹ *West. U. Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444, 21 S. E. 835.

⁶² *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843; *West.*

U. Tel. Co. v. Bruner, 19 S. W. (Tex.) 149.

⁶³ *West. U. Tel. Co. v. Neel*, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; *West. U. Tel. Co. v. Gibson*, 53 S. W. (Tex.) 712.

an extra charge to have the message delivered after the offices have closed, and when the company accepts the message with such an understanding, it is duty bound to make diligent and prompt delivery.⁶⁴ But a mere attempt to make immediate delivery, where there is no duty to deliver the next morning, will not render the company liable for a failure to deliver;⁶⁵ and a verbal agreement between the agent and the sender that the message need not be delivered at night, is binding.⁶⁶ Where a message, summoning a physician, has been received after the close of office hours the physical sufferings endured by the plaintiff during that time cannot be considered in determining the amount of damages to be awarded, even though the company negligently delays delivering the message after the office opened on the following morning.⁶⁷

§ 351. Knowledge of sender as to office hours.

These companies, having the right to adopt and enforce regulations respecting office hours, may bind all who apply to them for service, even though they may not have knowledge of the office hours of the company. It is the duty of the sender, when he delivers a message to the company at an unusual hour, to inquire as to whether or not the message can then be sent; and on failure to do so, if the message is delayed, on the account of its having been received after the closing hours, the company will not be liable for any injury arising thereby.⁶⁸ It has been held, however, that the sender is not bound if he had no knowledge of this fact,⁶⁹ yet we think that this is not sound doctrine.

§ 352. Telephone companies—enforcement of tolls.

Telephone companies have the same right to adopt, prescribe and enforce all reasonable regulations for the convenience of their business, as telegraph companies; and that which has already been said of

⁶⁴ West. U. Tel. Co. v. Perry, 30 Tex. Civ. App. 243, 70 S. W. 439; West. U. Tel. Co. v. Cavin, 30 Tex. Civ. App. 152; West. U. Tel. Co. v. Hill, 26 S. W. 252.

⁶⁵ West. U. Tel. Co. v. Rawls, 62 S. W. 136.

⁶⁶ West. U. Tel. Co. v. Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439.

⁶⁷ West. U. Tel. Co. v. Merrill, 22 S. W. 826; West. U. Tel. Co. v. Rosenreter, 80 Tex. 406, 16 S. W. 25.

⁶⁸ See note 59.

⁶⁹ See note 62.

certain particular regulations of the latter, is applicable to these companies. Thus, they may have reasonable office hours and are not under obligation to render service to any one outside of such hours. There is this distinction, however, between these companies in this respect: the party calling does not have to pay the toll until the communicant has been summoned to the telephone; and, if he cannot be found, the former knows immediately that he cannot communicate with him. It is no duty of the company to make an effort to get the party called to the telephone after the office at his end of the line has closed. They may enforce the payment of the rental; and on the failure of the subscriber to make such payment, his telephone may be removed from his premises, after giving timely notice to that effect.⁷⁰ The subscriber, it seems, cannot object to this act of the company on the ground that it has not given efficient service,⁷¹ or that the company is indebted to him.⁷² They may require the party calling, to go to the exchange office, and prepay the toll or that he deposit a sufficient amount at the toll station before any services shall be rendered. We think that they could not enforce a regulation whereby the subscriber is required to contract for a telephone for one year, before one is placed on his premises; but that they are under obligations to give him the same service, as any other subscriber, even though he may not desire the service so long. It is a reasonable rule of these companies that so much extra toll shall be paid after the conversation has extended beyond the regular time allowed for conversations; and they may limit the length of time of conversation over long distance telephones. As these companies are intended for general use, by persons of all classes, and for both sexes, those who use them may be required to conduct their conversation in a becoming manner, free from obscenity or profanity; and for a violation of this requirement, may be denied the further use of the telephone.⁷³ No regulation will be tolerated which prevents the public from having a fair and reasonable use of its telephones and exchanges, or denies to any one the rights secured to him by statute, or requires him to conduct his business

⁷⁰ *Malochee v. Great Southern, etc., Tel. Co.*, 22 So. (La.) 922.

⁷¹ *Cumberland Tel. Co. v. Baker*, 37 So. (Miss.) 1012.

⁷² *Rushville Cooperative Tel. Co. v. Irvin*, 27 Ind. App. 62.

⁷³ *Pugh v. City & S. Tel. Co.*, 9 Cen. L. B. 104, 27 Alb. L. J. 162.

with particular persons or agencies. Thus, a regulation is unreasonable and invalid if it prohibits subscribers from calling messengers otherwise than through the central office.⁷⁴

§ 353. May waive regulations.

Rules and regulations of these companies which are merely for their convenience may be waived,⁷⁵ either expressly or by implication, and whether or not they have been waived is a mixed question of law and fact. It may be inferred that they have been waived, if the company has failed repeatedly to enforce such a rule.⁷⁶ Thus, as has been heretofore said, they may enforce a rule prescribing reasonable office hours, yet if they accept messages for transmission and delivery after the closing of the office, it will be presumed that they have waived the regulation. They may require all messages tendered them to be in writing, but if they receive such orally they cannot set up this rule as a defense to an action brought for negligently transmitting or delivering a message. As, where the local office makes a practice of receiving for transmission messages, telephoned to it, and it does not appear that the company had forbidden the practice, it seems that the operator, in writing out the message, must be deemed the company's agent to render it liable for an error made by him in transcribing;⁷⁷ or, if the operator has been in the habit of receiving messages, verbally through the messenger; or, messages have been conveyed to him by means of a speaking tube, it will be presumed that the company has waived the regulation.⁷⁸ So, also, if the company has failed to require prepayment of the charges; or, has deferred the collection of same until some subsequent time; or, if the extra charge, which may be exacted of the sender for a delivery beyond the free delivery limits, has not been deposited, it will have waived its rights to enforce the regulation; and cannot, therefore, set up the

⁷⁴ *People v. Hudson River Tel. Co.*, 19 Abb. N. C. 466, 10 N. Y. Supt. Ct. 282.

⁷⁵ *West. U. Tel. Co. v. Stevenson*, 128 Pa. St. 442, 18 Atl. 441, 5 L. R. A. 515, 15 Am. St. Rep. 687; *People v. West. U. Tel. Co.*, 166 Ill. 15, 46 Atl. 731, 36 L. R. A. 637.

⁷⁶ *West. U. Tel. Co. v. Stevenson*, cited in note 75.

⁷⁷ *West. U. Tel. Co. v. Todd*, 22 Ind. App. 701.

⁷⁸ *West. U. Tel. Co. v. Stevenson*, cited in note 75.

fact of a non-compliance with the rule, as a defense to an action brought against it.⁷⁹ These companies may have the right to refuse certain messages tendered them for transmission, but if the operator should accept such a message, knowing that the company would refuse such, and negligently transmits or delivers it, whereby damages have been incurred, the company nevertheless will be liable.⁸⁰

⁷⁹ West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224n.

⁸⁰ Beasley v. West. U. Tel. Co., 39 Fed. 181; West. U. Tel. Co. v. Todd,

22 Ind. 701; Carland v. West. U. Tel. Co., 118 Mich. 369, 74 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; Texas Tel. Co. v. Seiders, 9 Tex. Civ. App. 431, 29 S. W. 258.

CHAPTER XVI.

DUTIES UNDER THE COMMON LAW.

§ 354. In general.

- 355. Act of God—not liable for—contract.
- 356. Same continued—express contract.
- 357. Same continued—burden of proof.
- 358. Public enemy.
- 359. Same continued.
- 360. Same continued—mobs, strikes, etc.
- 361. Same continued—strikes, not liable—must supply places.
- 362. Same continued—in cases of express contracts.
- 363. Connecting lines.
- 364. Negligence of the sender or sendee.
- 365. Proximate cause—burden of proof.

§ 354. In general.

Telegraph companies are not, strictly speaking, common carriers: and are not, therefore, held to such strict accountability as are the latter. The public, however, is interested in their business, in that they are exercising a public function and must, to that extent, as has been seen, manage and control their business affairs. The sources from which the public has obtained the power to exercise this control are now derived from statutes and the common law, and to these the reader must resort in order to ascertain such powers. Common carriers, under the common law, were held to the most strict accountability for their services to the public, and the question of negligence did not enter into consideration of the courts in determining a loss incurred. In other words, they were held strictly liable as insurers, and were responsible for all losses incurred, except such as may have been caused by the act of God or the public enemy. On account of these companies enlarging their lines of business and thereby holding themselves out to the public as willing to transport many and varied things which were not contemplated as subjects of transportation at the time the business was first begun—and many of which were of a peculiar perishable nature and otherwise more subject to loss or injury—the common-law rule has been somewhat relaxed and they are

not now held liable for every loss as they formerly were. Telegraph companies are not insurers, but in every other respect they are held to the same liability for losses and injuries, as are common carriers. They may, however, as will be seen hereafter, limit their common-law liabilities; and in most states, there are statutes which, more or less, give them the power to exercise this right.

§ 355. Act of God—not liable for—contract.

As we have seen, the common law holds that telegraph companies are exonerated in those cases where the act of God has been the proximate cause of the loss or injury to the business intrusted to their care—and in this respect there is no diversity of opinion—but what are such causes as may be considered the act of God, and such as will be sufficient to exonerate them for losses resulting therefrom, is not clearly defined by the courts; and this fact has brought about, to a certain extent, a diversity of opinion. It may be safely said, however, that if there is intervening any human agency which contributes in any manner, to the production of the loss or injury, and without which the company would be exonerated, on the ground that the loss was caused by the act of God, it will be liable.¹ Thus, if the condition of the company's lines or instruments are such that they cannot be used—and such conditions were originally caused by the act of God—the company will, nevertheless, be liable for any loss thereby incurred, if it is negligent, in anywise, in making a reasonable effort to repair, as speedily as possible, the defects. It is fairly well settled, that these companies will not be liable for losses caused by extraordinary tempest, storms or the like, unless their own negligence contributed to the production of the loss.² Thus, it has been held that they

¹ *Friend v. Woods*, 6 Gratt. 189, 52 Am. Dec. 119; *New Brunswick, etc., Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 396; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Hill v. Sturgeon*, 28 Mo. 323; *Strauss v. Wabash, etc., R. Co.*, 17 Fed. 209; *Graff v. Bloomer*, 9 Pa. St. 114; *Parker v. Flagg*, 26 Me. 181; *Miller v. Steam*

Navigation Co., 10 N. Y. 431; *Hays v. Kennedy*, 41 Pa. St. 378.

² *Nashville, etc., R. Co. v. King*, 6 Heisk. (Tenn.), 269; *Nashville, etc., R. Co. v. David*, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594; *Ballentine v. North Missouri, etc., R. Co.*, 40 Mo. 491, 93 Am. Dec. 315; *Wallace v. Clayton*, 42 Ga. 443; *Pearce v. The Thomas New*

are not liable for losses caused by severe windstorms;³ or where the lines have been broken or otherwise injured by sudden and unexpected freezes. Where there have been losses caused by other atmospheric conditions, they will not be held liable therefor.

§ 356. Same continued—express contract.

Telegraph companies may, however, bind themselves in such way as to be under obligation to transmit and deliver a message, irrespective of any loss from which they might have otherwise been exonerated by the fact that the proximate cause of the loss was the result of the act of God.⁴ In other words, they may make an express contract to transmit the message, or risk all hazards in the attempt, but in order to hold them, under such an agreement, the terms of the contract must be very clear and expressive; since, if there is any doubt as to the purport of the agreement, they will not be held liable. They may, furthermore, enlarge their common-law liabilities; but, at the same time, this additional undertaking may not be such as would hold them liable for losses caused by the act of God. In other words, they contract to insure a safe and correct transmission of messages intrusted to them; however, it would not be understood by such contract that they could be held liable for losses caused proximately from what is termed the act of God. Where there is an agreement entered into, whereby they enlarge their common-law liabilities in either way, they may exact of the sender an additional compensation for the extra risk assumed. It seems that it should be mostly discretionary with the company as to whether it should assume the risk in either instance, since, if the undertaking should appear unsurmountable, caused by the varied climatic changes—and they are better able

ton, 41 Fed. 106; Packard v. Taylor, 35 Ark. 402; Bowman v. Teall, 23 Wend. 306, 35 Am. Dec. 562; Harris v. Rond, 4 N. H. 259, 17 Am. Dec. 421; Slater v. South Carolina R. Co., 29 S. Car. 96.

³ Blythe v. Denver, etc., R. Co., 15

Colo. 333, 25 Pac. 702; Insurance Co. v. Transportation Co., 12 Wall. 194; Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469; Insurance Co. v. Boom, 95 U. S. 117.

⁴ Milton v. Denver, etc., R. Co., 1 Colo. App. 307, 29 Pac. 22.

to determine these conditions of affairs than any other—they should not be forced to accept a message for transmission under such contract, but it should be left entirely to their own sound discretion. For the reason that they are public enterprises, discharging public duties, and occasionally enlarging those duties, is no reason why undue advantage should be taken of them, and that additional, excessive and unnecessary burdens should be imposed upon them.

§ 357. Same continued—burden of proof.

Where a telegraph company relies upon the defense of the act of God, it must prove affirmatively that the loss or injury complained of was proximately caused by the act of God.⁵ There seems, however, to be a difference of opinion among the courts as to whether or not the company must supplement the evidence that the loss was the result of the act of God, by evidence to the effect that the loss was not the result of any negligence on its own part. Some of the courts hold that all that is necessary for the company to prove is, that the loss or injury arose from what is termed the act of God,⁶ while other courts hold that they must not only prove that the loss was caused by the act of God, but, also, that no act on their part contributed to the loss.⁷ In other words, they must affirmatively show that there was no negligence or fault on their part. If the negligence of the company intervened or contributed to the production of the loss, the rule that the company may be exonerated by the act of God does not apply, since the negligence of the company will be considered

⁵ Wallingford v. Columbia, etc., R. Co., 26 S. Car. 258; Denver v. Chicago, etc., R. Co., 52 Iowa 161, 2 N. W. 1093, 35 Am. Rep. 263; Colton v. Cleveland, etc., R. Co., 67 Pa. St. 211, 5 Am. Rep. 424; Agrew v. Steamer Costa Rica, 27 Cal. 425, 87 Am. Dec. 87; Southern, etc., Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Leonard v. Hendrickson, 18 Pa. St. 40, 55 Am. Dec. 587; Craig v. Childress, Peck. (Tenn.) 270, 14 Am. Dec. 751; Lamb v. Camden, etc., R. Co., 46 N. Y. 271, 7 Am. Rep. 327.

⁶ Railroad Co. v. Reeves, 10 Wall. 176; Maguire v. Densmore, 56 N. Y. 168; Wolf v. American, etc., Co., 43 Mo. 421, 97 Am. Dec. 406; Little Rock, etc., R. Co. v. Corcoran, 40 Ark. 375.

⁷ Brown v. Adams, etc., Co., 15 W. Va. 812; Ryan v. Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589; Steele v. Lowensend, 37 Ala. 247, 79 Am. Dec. 49; Gray v. Mobile, etc., Co., 55 Ala. 387, 28 Am. Rep. 729.

the proximate cause of the loss or injury.⁸ If this rule should be resorted to by the company for its own protection, it must be shown that the act of God was the proximate, and not the remote, cause of the loss;⁹ and the burden is cast upon the company to make such showing, for, surely, when it makes this defense—and that about which it knows more than any other—it should be able to sustain it by proof. It seems to us that this proof should be very clearly and affirmatively shown, since to hold otherwise might have the tendency to give these companies an easy defense to avoid many of their liabilities. Some of the courts have held that these companies must show that the act of God was the sole cause of the loss.¹⁰

§ 358. Public enemy.

As has been heretofore averted to, telegraph companies are not liable for losses caused by acts of the public enemy; and in considering this question, it might be well to say something about what is meant by the term "public enemy." The term "public enemy" means those people with whom the country is at war, and does not include thieves, rioters or insurgents. Thus, when the war between the United States and Mexico was raging, the latter was a public enemy to this country; however, there were few adjudications arising out of losses to persons during this war, and there are few to be found in our country up until the beginning of, or during, the Civil War, and all of these pertained to the destruction of goods in the charge of common carriers. In these cases it was held that as to goods in the possession of carriers operating within the territory under the control of the federal government, the destruction by the Confederate forces was a destruction by the public enemy for which

⁸ McGraw v. Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Packard v. Taylor, 35 Ark. 402, 37 Am. Rep. 37.

⁹ Hays v. Kennedy, 41 Pa. St. 378, 80 Am. Dec. 627; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; Reed v. Spaulding, 30 N. Y. 630, 86 Am. Dec.

426; Steele v. McTyre, 31 Ala. 667; 70 Am. Dec. 516.

¹⁰ Reed v. Spaulding, 30 N.Y. 630, 86 Am. Dec. 426; Michaels v. New York, etc., R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Crasby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142.

the carrier would not be responsible.¹¹ Likewise it was held that destruction by the federal troops of goods in the possession of carriers operating within the Confederate lines, was also a destruction by the public enemy.¹² But if the goods had been received within the Confederate lines and destroyed by their troops therein,¹³ or vice versa, if they had been received and destroyed within the federal lines by their own military troops,¹⁴ the destruction would not be considered as that done by the public enemy and the carriers could not, therefore, relieve themselves of liability. The business of a carrier, in some respects, is similar in character to that of telegraph companies; and, as the former has been in use much longer than the latter, whereby there are to be found many more decisions on points of law now considered with respect to telegraph companies, we are often found resorting to such decisions, since they in many instances are applicable to the latter companies.

§ 359. Same continued.

It was said in the previous paragraph that insurgents were not classed as the public enemy; but if they have become so hostile and ravenous, and have gathered such strength of force as to involve the country in civil war, they will be considered a public enemy.¹⁵ It is not necessary for the government to declare war against those who are in arms against it, to make them a public enemy; but if the condition of affairs is such as to place the country in an actual state of war, such insurgents then will be nothing less than an enemy to the public. One of the great reasons why all corporations exercising public functions are exonerated from losses caused by the public enemy is, that the public has failed to discharge its part of the agree-

¹¹ *Morse v. Slue*, 2 Keb. 866, 3 Keb. 72, 112, 135, 2 Lev. 69, 1 Mod. 85, T. Raym. 220, 1 Vent. 190, 238; *Bland v. Adams Express Co.*, 1 Duv. (Ky.) 233, 85 Am. Dec. 623; *Louis v. Ludwick*, 6 Coldw. (Tenn.) 368, 98 Am. Dec. 454; *Nashville, etc., R. Co. v. Estis*, 10 Lea (Tenn.) 749; *Nashville, etc., R. Co. v. Estis*, 7 Heisk. (Tenn.) 622.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Nashville, etc., R. Co. v. Estis*, 10 Lea (Tenn.) 747; *McCraine v. Wood*, 24 La. Ann. 406; *Holladay v. Kenwood*, 12 Wall. 354; *Southern, etc., Co. v. Womack*, 1 Heisk. (Tenn.) 256; *United States v. Palmer*, 3 Wheat. 610.

ment—under which these business enterprises assumed public duties—in protecting them in their inheritable rights and guaranteeing them a free exercise of their business, unmolested by any act which should be protected by the government. As the government has failed to carry out its part of the agreement, the other contracting party, as in all contracts, cannot be forced to continue operating under the same agreement; and any loss or injury which has been brought about by the party at fault, cannot afterwards be taken advantage of by this party or any of his agencies. It is their duty, however, when the business of any of these corporations is being interfered with by the public enemy, to use due care and diligence to prevent any loss which might likely be caused by the latter; and, so where they are derelict in this respect, or where their own negligent acts have intervened and contributed to the production of the loss, they will not be exonerated for such acts, since their negligence will be deemed the proximate cause of the loss. They can never be relieved from liability for the acts of the public enemy until such fact is proven affirmatively by them to be the proximate cause of the loss.¹⁶ Not only is the burden of proof cast upon these companies, but they must further show by competent and sufficient evidence that the loss was not the result of any negligence or want of care on their part. It may seem strange, from what has been said with respect to the government failing to perform its part of the contract in protecting these corporations in their business, that there should be any duty on the part of the latter to exercise care in attempting to avoid losses arising from acts of the public enemy. But it must be understood that, while these corporations stand in a most peculiar relation toward the government, in that they do not have, strictly speaking, the same senses which a real human possesses, and that their privileges, duties and exemptions are different, in some respects, to a private citizen, yet they are considered, under the rules of law, to be classed and comprehended under the term “citizen.” It is the duty of every citizen—whether he be but a common layman, toiling through the chilly climes of the North or the sultry suns of the South, in the faithful performance of his manual services; or, whether he be a bonded officer in the discharge of his official duties—to protect the

¹⁶ *Halliday v. Kennard*, 12 Wall. 254.

government in its laws and in its property. To this extent, as all other citizens, these corporations must extend a willing hand. And whenever it is possible for them, by exercising due and reasonable care, to protect any property of the government, or any citizen thereof, from the depredation or destruction of the public enemy, it most assuredly is part of their duty to do so.

§ 360. Same continued—mobs, strikes, etc.

Under the ancient rule, carriers were not exonerated for losses caused by the acts of mobs, or other riotous persons; but the stringency of this rule has been somewhat relaxed by the more modern authorities. They are still held liable for all losses caused by such acts, but are not liable for loss in the transportation of goods by any delay caused thereby. There is a difference, however, in the application of this rule to carriers and to telegraph and telephone companies. As a general rule, the latter companies are not liable for losses arising from acts of mobs and other riotous persons. The acts of the mob stand, with respect to these companies, in almost the same category as those of the public enemy. The different means and instrumentalities through which they accomplish their respective corporate purposes bring about the difference in the application of this rule. It is never presumed that mobs intend to take possession of goods and convert them to their own use; and, the tangible property to such, being in the custody of the carriers, they are more able to protect and deliver them safely to the consignee; and, as has been said, they are not liable for losses caused by such delay. On the other hand, the main and principal object of mobs and other riotous persons, who interfere with the business of telegraph companies, is to prevent and obstruct the transmission of news; especially, until they shall have accomplished some particular purpose. As has often been said, they are never held liable as insurers, unless an express agreement has been entered into to that effect. And for the reason that they are not in possession of the tangible property of the message in transit, they do not have the same opportunity to protect it as the carrier has his goods. It is the duty, however, of these companies, where they have been thus interfered with, to make a reasonable effort to transmit the telegram by other lines or by other means;

and on a failure to do so, they will be held liable for all losses suffered.

§ 361. Same continued—strikes, not liable—must supply places.

The same rule applies, where the mob is composed of employees of the company who are on a strike. One of the most puzzling questions which confront these large corporations and other public institutions in this day and time is, How they may be able to manage and control their employees to their best interest, and at the same time faithfully discharge the duties they owe to the public? The term "strike" is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing themselves to resume work, or often allowing other to tender their services to assist in carrying on such work, until the demanded concession shall have been granted.¹⁷ There is a distinction to be drawn between the liabilities of common carriers and telegraph companies, for the acts of their respective employees, whose object is to accomplish some of the above mentioned concessions. Common carriers, being insurers, are liable for all losses caused by the acts of their employees while on a strike; provided, the same has not become such as would be considered a crime or an unlawful act of the employees. For a loss resulting solely from lawless violence of men not in the employment of the company, the latter will not be responsible, even though the men, whose violence caused the loss, had but a short time before been employed by the company.¹⁸ If they have employed other competent men within a reasonable time to supply the places of the striking employees, but these have been prevented from accepting employment by the violent acts of the latter, they will not be liable for any loss resulting thereby.¹⁹ Telegraph companies are not insurers and are not, therefore, liable for losses caused by the acts of their employees while on a strike. If, however, the strike has been caused by any

¹⁷ Anderson's L. Dict.; Black's L. Dict.; Bouvier's L. Dict.; Delaware, etc., R. Co. v. Bowers, 58 N. Y. 582.

¹⁸ Pittsburg, etc., R. Co. v. Hozen, 84 Ill. 36.

¹⁹ Id.

fault of the company, in unreasonably reducing the wages of the employees, or increasing the time of service unreasonably long, or in otherwise refusing to grant reasonable concessions to them, it will be liable. Telegraph companies must exercise reasonable diligence in making an effort to supply the places of the employees with competent men; and on a failure so to do, they will be liable for all losses resulting therefrom. If the strike is among the employees discharging a certain particular line of business, and the same can be performed by those who have not made a strike, it is the duty of the company to see that the latter discharges this duty.

§ 362. Same continued—in cases of express contracts.

Where a telegraph company makes an express contract with the sender, wherein it undertakes without limitation or qualification to safely transmit and deliver a message within a time definitely fixed by contract, the fact that a mob, or the employees while on a strike, prevents the company from performing the contract, will not exonerate it from liability for a loss suffered during the transmission of the message. It is necessary in these contracts, as in those expressly made, wherein these companies enlarge their common-law liability with respect to losses caused by the act of God or the public enemy, that the extra risk or hazard assumed must be very explicitly given; for if there is any doubt or ambiguity on the face of the contract, it will be construed most forcibly in favor of the company. So, it will be very clearly seen that there is a marked distinction between cases where there is no express contract to transmit and deliver within a limited time and cases where there is such an express contract. An express contract, binding a telegraph company to transmit a message irrespective of its being interfered with by any act of God or the public enemy, will not bind the company for losses caused by the act of a mob or that of a strike.

§ 363. Connecting lines.

As has been seen, a telegraph company may enter into an express contract to transmit and deliver safely certain messages intrusted to it, irrespective of the liabilities from which it may have been exon-

erated under the common law. In other words, it may make an express contract to transmit a message correctly or be liable for any losses incurred by a failure to do so, although such loss may be the result of an act of God or the public enemy, or acts of mobs or strikes. But where such contract is entered into between the sender and a telegraph company, it will not bind a connecting company over whose lines it is necessary to transmit the message, even though it is the custom to transmit messages over these connecting lines.²⁰ If, however, there is an express agreement with the connecting company to assume all risk or undertaking of the initial lines; or, if they are carrying on a partnership business; or, if they are leased or owned by the initial company, they will be bound by the contracts of the former. It seems that where they are bound only by an express agreement, this should be conditional on the connecting company accepting the message. As was said, the companies could, under certain circumstances, refuse to enter into a contract to this effect, and the same right should be extended to a connecting company; because the conditions there stated, which would give the initial company the right to refuse to enter into a contract of this nature, might not exist with respect to this company at the time the message was tendered to it, but would with the connecting line. Of course the initial company would, nevertheless, be liable. Where there is such an extraordinary risk assumed, and it is necessary for the message to be transmitted over connecting lines to reach the destination, the initial company should ascertain as to whether the connecting company would accept the message, before the former accepts it. When this is done, and all the connecting lines agree to accept the message, under the contract of the initial company, they will then be liable.

§ 364. Negligence of the sender or sendee.

Another ground allowed, under the common law, for exonerating a telegraph company for losses caused in a failure to correctly transmit and deliver a message, is by acts of either the sender or sendee. There is no consideration of policy which demands that these companies should be held to account for an injury occasioned by the

²⁰ *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 31 Am. St. Rep. 59, 19 S. W. 441.

sender or sendee's own act; and it is immaterial whether or not such act of either of these parties, causing the loss, amounts to negligence.²¹ Thus, if the sender fails to address the message correctly; or, where he fails to make prepayment of charges on demand; or, where the operator, who is the sender, fails to correctly transmit and loss is incurred, the company will not be liable. When the addressee misconstrues an ambiguous telegram; or, when he refuses to pay the extra charges for delivery beyond the free delivery limit, his acts will exonerate the company for any loss caused thereby.

§ 365. Proximate cause—burden of proof.

When a telegraph company relies on the defense that the cause of the loss was the act of a mob or that of a strike of its own employees, it must be shown that this act was the proximate cause of the loss, since if any wrong or negligence of the company contributed to the act, the company's act will be presumed to be the proximate cause of the loss; and the burden of proof is cast upon it to show that the proximate cause of the loss was the act of the mob or the strike, and not any negligence on its part. But in case of any wrong or negligence on the part of either the sender or addressee, contributing to the act which produced the loss, the rule is different. There, the injured party must show that the loss or injury was not caused by any injury on his part, but that the proximate cause of the injury was that of the company.

²¹ *Hart v. Chicago, etc., R. Co.*, 69 *Crawenshield*, 3 *Cliff. (U. S.)* 184, 5 *Iowa* 485, 29 *N. W.* 597; *Choate v. Fed. Cas.* No. 2691.

CHAPTER XVII.

LIMITING COMMON LAW LIABILITIES.

- § 366. Stipulation in contract of sending.
- 367. Negligence—cannot contract against—in most states.
- 368. Applicable to statutory penalty.
- 369. May contract against negligence in some states.
- 370. Prohibited by statutes in some states.
- 371. Gross negligence.
- 372. Gross negligence—what constitutes.
- 373. Ignorance of operator of the locality of the place.
- 374. Conflict of laws.
- 375. Stipulation for repeating messages.
- 376. Same continued—validity of such a stipulation.
- 377. Same continued—further reasons for their own protection.
- 378. Same continued—extra charge—no increase of duty.
- 379. Same continued—delay in delivery—non-delivery.
- 380. Same continued—not a contract—compared to a bill of lading.
- 381. Same continued—contract—no consideration.
- 382. Same continued—duress.
- 383. When requested to be repeated—question of fact.
- 384. Same continued—binding on sender only.
- 385. Times within which claims are to be presented.
- 386. Same continued—reasons for rule.
- 387. Same continued—statutory penalty—applicable.
- 388. Same continued—not to be prosecuted by the public.
- 389. Stipulation held void as against public policy.
- 390. When limitation begins to run.
- 391. Same continued—delay in receiving messages—does not modify stipulation.
- 392. Same continued—unaware of wrong—not binding.
- 393. Compliance with stipulation—what constitutes.
- 394. Same continued—waiver of written claim.
- 395. Same continued—nature of the claim.
- 396. Must be presented to proper officer.
- 397. Commencement of suit—whether sufficient notice.
- 398. Contrary holding—better view.
- 399. Limiting liability to specific amount.
- 400. Same continued—nature of—liquidated damages.
- 401. Same continued—insured—same rule.
- 402. Night messages—time to be delivered.
- 403. Unavoidable interruption—special contract.
- 404. Over connecting lines—stipulation—exemptions.
- 405. Stipulation against cipher messages—valid.

- 406. Same continued—contrary view.
- 407. Where and when messages accepted.
- 408. Delivery to messenger—valid.
- 409. Waiver of stipulation limiting company's liability.
- 410. Burden of proof.
- 411. Proof of assent to stipulation.
- 412. Contrary holding.
- 413. Special contracts—not applicable.
- 414. Small type—not fraud.
- 415. Assent of addressee.
- 416. Same continued—illustrations.
- 417. Same continued—actions in tort.
- 418. The correct view as considered.
- 419. Assent—proof of—what amounts to.
- 420. Stipulation posted in company's office—not binding.
- 421. Messages written on blanks of another company—binding.
- 422. Same continued—knowledge of company's stipulations.
- 423. Messages delivered to company by telephone or verbally.
- 424. Principal bound by the knowledge of the agent.

§ 366. Stipulation in contract of sending.

Telegrams are invariably written on blanks furnished by telegraph companies, on the backs of which are generally found stipulations exempting them from certain liabilities, and which are apparently agreed to by the sender when he attaches his signature thereto. The question with which the courts have been and are still confronted is, whether such contracts or stipulations are binding, either on the sender or on the addressee, or on both? The courts are not in harmony on this subject. Some hold that some of these stipulations are reasonable and binding and others hold that none of them can be enforced; ¹ still others hold that all of them are binding where they are not in conflict with any statute or against public policy. Many states have adopted statutes which provide that these companies may adopt and enforce reasonable rules and regulations for the purpose of carrying on their business, and thereby relieve themselves from some of their common-law liabilities; and where statutes have not been enacted to this effect, the courts, in some of those states, have held

¹ West. U. Tel. Co. v. Beals, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682; Kemp v. West. U. Tel. Co., 28

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Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363; West. U. Tel. Co. v. Eubanks, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 361, 36 L. R. A. 711.

that they had the right, without such statutes, to make such rules and regulations. It is held in most, if not in all, of the states that the company may, by a special express contract, limit its common-law liability. There is, however, some conflict among the courts as to how far they may be limited and what is sufficient to constitute a valid special contract. The various phases of these stipulations will be considered in the following sections.

§ 367. Negligence—cannot contract against—in most states.

The general rule, supported by the weight of authority is, that telegraph companies cannot by any kind of a contract exempt themselves from losses caused by their own negligence or that of their servants.² The rule rests upon the consideration of public policy and

² Willock v. Pennsylvania R. Co., 166 Pa. St. 184, 30 Atl. 948, 27 L. R. A. 228; Thomas v. Wabash, etc., R. Co., 63 Fed. 200; Eels v. St. Louis, etc., R. Co., 52 Fed. 903; Mobile, etc., R. Co. v. Houkins, 41 Ala. 486, 94 Am. Dec. 607; Louisville, etc., R. Co. v. Grant, 99 Ala. 325; 13 So. 599; Standard, etc., Co. v. White Lim., etc., Co. 122 Mo. 258, 26 S. W. 704; Johnson v. Alabama, etc., R. Co., 69 Miss. 191, 11 So. 104; Squire v. New York, etc., R. Co., 98 Mass. 239, 93 Am. Dec. 182; American U. Tel. Co. v. Dougherty, 89 Ala. 181, 7 So. 433; Stiles v. West. U. Tel. Co. 15 Pac. 712; West. U. Tel. Co. v. Short 53 Ark. 434, 14 S. W. 649; West. U. Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; West. U. Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480. Compare West. U. Tel. Co. v. Fontaine, 58 Ga. 433; Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; West. U. Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; West. U. Tel. Co. v. Meek, 49 Ind. 53; West. U. Tel. Co. v. Fenton, 52 Ind. 1; West. U. Tel. Co. v. Adams, 87 Ind. 598, 44 Am. Rep. 776; West. U. Tel. Co. v. Meredith, 95 Ind.

93; Central U. Tel. Co. v. Swoveland, 14 Ind. App. 341; Sweetland v. Illinois, etc., Tel. Co., 27 Iowa, 433, 1 Am. Rep. 285; Manville v. West. U. Tel. Co., 37 Iowa 214, 18 Am. Rep. 8; Harkness v. West. U. Tel. Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 762; Camp v. West. U. Tel. Co. 1 Met. (Ky.) 164, 71 Am. Dec. 461; Smith v. West. U. Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126; LaGrange v. Southwestern Tel. Co., 25 La. Ann. 383; Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 437; Ayer v. West. U. Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; West. U. Tel. Co. v. Goodbar, 7 So. (Miss.) 214; Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609, overruling Wann v. West. U. Tel. Co., 37 Mo. 472, 90 Am. Dec. 395; Kemp v. West. U. Tel. Co., 28 Neb. 661, 26 Am. St. Rep. 363. Compare, Becker v. West. U. Tel. Co., 11 Neb. 87, 7 N. W. 868, 38 Am. Rep. 356. Sherrill v. West. U. Tel. Co., 116 N. Car. 655, 21 S. E. 429; Brown v. Postal Tel. Co., 111 N. Car. 187; 16 S. E. 172, 17 L. R. A. 648, 32 Am. St. Rep. 792; West.

upon the fact that to allow the companies to absolve themselves from the duty of exercising care and fidelity, would be inconsistent with the very nature of their undertaking.³ It is the duty of every citizen, while following his daily avocation, to exercise due care and fidelity toward his fellow man; and for any negligent failure to do so, whereby the latter suffers loss, the former will be liable. These companies have assumed public functions and the care and fidelity which they owe the public is even much greater than those of private citizens. In other words, these parties do not stand on equal footing with telegraph companies, but the latter has acquired, in consideration of public duties assumed, certain privileges and exemptions, under the articles of incorporation, which are not enjoyed by the public in general; therefore, to permit them to exempt themselves from liability caused by their negligence would, in effect, authorize them to abandon the most essential duties of their employment.⁴

§ 368. Applicable to statutory penalty.

The rule that a telegraph company cannot exempt itself by contract from losses caused by its own negligence or that of its servants, is applicable to statutory penalties. Thus, where a company is sued for negligently transmitting or delivering a message, under a statute imposing a penalty on telegraph companies for failing to exercise reasonable care and diligence in transmitting or delivering messages, it will be liable although the message was written on a blank form of the company, on the back of which was a stipulation purporting to be a contract exempting the company for any loss caused by its negligence, provided the same was not ordered to be repeated.⁵

U. Tel. Co. v. Griswold, 37 Ohio St. 303, 41 Am. Rep. 500; Marr v. West. U. Tel. Co., 85 Tenn. 529, 3 S. W. 496; Pepper v. West. U. Tel. Co., 87 Tenn. 554, 4 L. R. A. 660, 10 Am. St. Rep. 699; West. U. Tel. Co. v. Brosche, 72 Tex. 654, 13 Am. St. Rep. 843; West. U. Tel. Co. v. Neill, 57 Tex. 283, 11 S. W. 783, 44 Am. Rep. 589; Womack v. West. U. Tel. Co., 58 Tex. 176, 44 Am. Rep. 614; Wirtz v. West. U. Tel. Co., 7 Utah 446, 27 Pac. 172, 3 L. R. A. 510n; Gillis v. West. U. Tel.

Co., 61 Vt. 461, 17 Atl. 796, 4 L. R. A. 611n, 15 Am. St. Rep. 917; Candee v. West. U. Tel. Co., 34 Wis. 471, 17 Am. Rep. 452; Thompson v. West. U. Tel. Co., 64 Wis. 531, 54 Am. St. Rep. 644.
³ Moulton v. St. Paul, etc., R. Co., 31 Minn. 85, 16 N. W. 497.

⁴ West. U. Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 140.

⁵ West. U. Tel. Co. v. Adams, 87 Ind. 598, 44 Am. Rep. 776; West. U. Tel. Co. v. Cobbs, 47 Ark. 334, 1 S. W. 558, 58 Am. Rep. 756; West. U. Tel.

§ 369. May contract against negligence in some states.

In those states where the lines are sharply drawn as to their character as common carrier, and where their business is considered as purely of private concern, it is held that telegraph companies may limit their liability for their own negligence or errors, especially when arising from any cause except willful misconduct or gross negligence;* but the weight of authority is to the contrary. And, in these states it seems that there is a distinction between slight or ordinary negligence and such as amounts to gross negligence, or willful default; and they hold that these companies can only contract against liabilities caused by slight or ordinary negligence⁶ and not such as are caused by gross negligence. As was said, "The exemption is not extended to acts or omissions involving gross negligence, but is confined to such as are incident to the service, and may occur when there is slight attaching culpability in its officers and employees."⁷ It has also been held that these companies could contract against liabilities of inadvertence, but not against gross negligence, misconduct or bad faith.⁸ The rule in New York seems to be that while a telegraph company cannot contract against its own negligence, yet it

Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744; West. U. Tel. Co. v. Young, 93 Ind. 118.

* West. U. Tel. Co. v. Carew, 15 Mich. 525; Birkett v. West. U. Tel. Co., 103 Mich. 361, 50 Am. St. Rep. 374, 61 N. W. 645; Redpath v. West. U. Tel. Co., 112 Mass. 71, 17 Am. Rep. 69; Wann v. West. U. Tel. Co., 37 Mo. 472, 90 Am. Dec. 395; U. S. Tel. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519; Hart v. West. U. Tel. Co., 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119. This question, with full citation of the earlier cases, is fully and learnedly considered in a note of 71 Am. Dec. 463, 466, 467, etc.; West. U. Tel. Co. v. Stevenson, 128 Pa. St. 442, 15 Am. St. Rep. 687, 18 Atl. 441; Pearsall v. West. U. Tel. Co., 124 N. Y. 256, 21 Am. St. Rep. 662, 26 N. E. 534.

⁶ Illinois Central R. Co. v. Morrison, 19 Ill. 136; Wabash, etc., R. Co., v. Brown, 152 Ill. 484, 39 N. E. 273.

⁷ Lassiter v. West. U. Tel. Co., 89 N. C. 336; Pegram v. West. U. Tel. Co., 97 N. C. 57; Becker v. West. U. Tel. Co., 11 Neb. 87, 7 N. W. 868, 38 Am. Rep. 356; Grennell v. West. U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Redpath v. West. U. Tel. Co., 112 Mass. 71, 17 Am. Rep. 69.

⁸ Wann v. West. U. Tel. Co., 37 Mo. 472, 90 Am. Dec. 395; U. S. Tel. Co. v. Gildersleeve, 29 Md. 232; 96 Am. Dec. 519; Hart v. West. U. Tel. Co., 66 Cal. 579; 56 Am. Rep. 119; White v. West. U. Tel. Co., 14 Fed. 710, 5 McCrary (U. S.) 103; MacAndrew v. Electric Tel. Co., 17 C. B. 3, 84 E. C. L. 3.

may against the negligence of its servants in any degree.⁹ And it seems to be the holding in other states that they can relieve themselves from liability for negligence where the services are done gratuitously.¹⁰ In those states which hold that these companies may contract against liabilities for negligence, the contract under which they claim the exemption must be clear and free from doubt, for the exemption will not be granted where the language of the contract is ambiguous.¹¹

§ 370. Prohibited by statutes in some states.

In some states, in which it may have formerly been the rule that these companies could contract against their own negligence, to some extent at least, the same has been changed either by statute or later decisions. Thus, the rule in Nebraska has been established by a statute which eliminates considerations of degree of negligence in this connection.¹² In Georgia it was intimated in one case that these companies might restrict their liability except for gross negligence,¹³ but in a later case the rule was announced that they could not contract against their negligence in any degree.¹⁴ In Texas it was held that the stipulations of these companies will not extend to injuries caused by the "misconduct, fraud or want of due care on the part of company, its servants or agents."¹⁵ It is held, however, that this statute does not extend to interstate messages.¹⁶ Statutes similar to

⁹ *Maynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Nicholas v. New York, etc., R. Co.*, N. Y. 370; *Smith v. New York, etc., R. Co.*, 24 N. Y. 222; *Crogin v. New York, etc., R. Co.*, 51 N. Y. 61, 10 Am. Rep. 559.

¹⁰ *Griswold v. New York, etc., R. Co.*, 53 Conn. 371; *Higgins v. New Orleans, etc., R. Co.*, 28 La. Ann. 133; *Quimby v. Boston, etc., R. Co.*, 150 Mass. 360, 5 L. R. A. 846; *Kinny v. Central R. Co.*, 32 N. J. L. 407, 34 N. J. L. 513; *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46.

¹¹ *Maynard v. Syracuse, etc., R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28. See note 7 for other cases.

¹² *Kemp v. West. U. Tel. Co.*, 28 Neb. 661.

¹³ *West. U. Tel. Co. v. Fontaine*, 58 Ga. 433.

¹⁴ *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480. See also, *West. U. Tel. Co. v. Goodbar*, 7 So. (Miss.) 214.

¹⁵ *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Womack v. West. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614.

¹⁶ *Missouri Pac. R. Co. v. Sherwood*, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 648; *Missouri Pac. R. Co. v. International, etc., Co.*, 84 Tex. 149, 19 S. W. 459.

these have been passed in other states, and in one of these, at least, it was held that such a statute was not repugnant to the federal constitution as a regulation of commerce.¹⁷

§ 371. Gross negligence.

As has been seen, there seems to be a holding among some of the courts that there are different degrees of negligence, or that there is a difference between negligence and gross negligence, but the weight of authority is that there are no degrees of negligence; and yet, what the term "gross negligence" means is not to be easily ascertained. There is authority for holding it to be equivalent to fraud or intentional wrong.¹⁸ But a majority of the cases seem to hold it to be a failure to exercise ordinary care. It was said by Baron Rolfe that he could "see no difference between gross negligence and negligence; that it was the same thing with vituperative epithet."¹⁹ There is really no intelligible distinction existing between the two words,²⁰ but if the act of the company should extend to what might be considered a willful or intentional wrong—if this is meant to be gross negligence—there is a distinction. Telegraph companies which hold themselves out to the public, must exercise the same diligence and care that any prudent and careful person would do under similar circumstances, and whenever they attempt to shield themselves from performing such duties by claiming an exemption therefrom by any contract or regulation entered into by them with their patrons, they then step beyond the bounds of right, justice and good conscience. When they fail to discharge their duty it is negligence, whether it be simply ordinary or gross negligence.²¹

§ 372. Gross negligence—what constitutes.

In those states where it is claimed that there is a distinction between negligence, and gross negligence it seems that it is rather diffi-

¹⁷ *Hart v. Chicago, etc., R. Co.*, 69 Iowa 485, 29 N. W. 597.

¹⁸ *Jones on Bailees*, 8-46 et seq.

¹⁹ *Wilson v. Brett*, 11 M. & W. 113.

²⁰ *Hinton v. Dibbon*, 2 Ad. & El. (U. S.) 646; *Austin v. Manchester R. Co.*, 11 Eng. L. & Eq. 573.

²¹ *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611n, 15 Am. St. Rep. 917; *Aiken v. West. U. Tel. Co.*, 5 S. Car. 358; *Beal v. South Devon R. Co.*, 3 H. & C. 337.

cult for the courts therein to determine what facts are necessary to constitute gross negligence. It has been held by some authorities that, where a message is improperly transmitted, this is sufficient evidence to show gross negligence in the absence of proof showing why such error was made; but the weight of authority is to the contrary.²² Thus, where the only evidence of negligence is that the operator sent in the message the word "bain" for "bail," it was held that there was no proof of gross negligence.²³ The same rule is true where the word "fourths" is written instead of "eighths," in a message from an agent informing his principal of the price of cotton.²⁴ But to make as many as three errors in a message containing only nine simple words, is gross negligence. Thus, a message tendered to be sent contained the following words: "Ship Bones, sulky and traps to Valley Falls, immediately, G. Grall;" and the message received by the addressee read, thus: "Ship Beans, sulky and trap to Neosha Falls immediately, G. Crawley." Here it was held that the evidence showed gross negligence.²⁵ In another case it appeared that the message was plainly written out and not to be easily mistaken by anybody with ordinary understanding who should examine it with ordinary care. The operator materially changed the message by transmitting the word, "Salina" for "Salene." There being no exonerating or explanatory evidence offered by the company, the court held that it was a case of gross negligence.²⁶ It was held gross negligence for the receiving operator, who had been informed that the message contained nine words, to deliver the message with only seven words.²⁷ In order for any court to arrive at an accurate determination as to whether a telegraph company has, in the transmission, committed an error which amounts to gross negligence within the meaning of the rule stated, it is necessary for all the facts and circumstances surrounding the particular case to be carefully considered. Because of the fact

²² *Pegram v. West. U. Tel. Co.*, 97 N. C. 57; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Becker v. West. U. Tel. Co.*, 11 Neb. 87, 7 N. W. 868, 38 Am. Rep. 356; *Jones v. West. U. Tel. Co.*, 18 Fed. 717.

²³ *Hart v. West. U. Tel. Co.*, 66 Cal. 579, 56 Am. Rep. 119.

²⁴ *Lassiter v. West. U. Tel. Co.*, 89

N. C. 334; *White v. West. U. Tel. Co.*, 14 Fed. 710.

²⁵ *West. U. Tel. Co. v. Crall*, 38 Kan. 679, 5 Am. St. Rep. 795, 17 Pac. 309.

²⁶ *West. U. Tel. Co. v. Howell*, 38 Kan. 685, 17 Pac. 313.

²⁷ *West. U. Tel. Co. v. Goodbar*, 7 So. (Miss.) 214.

that different circumstances alter all cases, it would be difficult to lay down any fixed rule by which courts might be guided. An error of a single word, in the transmission of a message, may or may not amount to gross negligence.

§ 373. Ignorance of operator of the locality of the place.

It is the duty of telegraph operators to know the localities of the towns in the state to which their lines extend, and the ignorance of the operator of such a fact, especially where it is of sufficient nearness to the office in which he works or is of some importance, whereby he fails to make a transmission thereto, is evidence of gross negligence. Thus, where the message was addressed to a party at the county seat of the adjoining county, it was held gross negligence in him sending it to another place.²⁸ The court said, in this case: "That if the agent of a company should not know of the existence of a town which is the county seat of a neighboring county, the town being one of the stations on the lines of the company, shows his utter unfitness for the position . . . the company was guilty of gross negligence in employing such an operator." In another case it was held by the court that the operators are bound to know the locality of any state to which a message is sent.²⁹ It was held that an error in the name of the destination, unexplained, is evidence of gross negligence.³⁰ And where the message has not been sent at all, it is purely evidence of gross negligence.³¹

§ 374. Conflict of laws.

It has been held that the contract exempting telegraph companies from common-law liabilities must be proved, as a matter of evidence, according to the law of the forum;³² but the general rule is that the law of the place, where the contract of sending is made, and not that of the state to which the message is sent or where the error occurred,

²⁸ West. U. Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744.

²⁹ West. U. Tel. Co. v. Simpson, 73 Tex. 422.

³⁰ West. U. Tel. Co. v. Howell, 38 Kan. 685, 17 Pac. 313; Postal Tel. Cable Co. v. Robertson, 36 Misc. (N. Y.)

785 (message directed to Toledo sent to Chicago).

³¹ Garrett v. West. U. Tel. Co., 83 Iowa, 257, 49 N. W. 88.

³² Gildhall, 58 Fed. 796; Hoadley v. Northern Transf. Co., 115 Mass. 304.

governs as to its nature, validity and interpretation.³³ So it has been held that, if the state in which the contract of sending is made does not give these companies the right by statute to contract against common-law liabilities, they cannot exonerate themselves from losses or injuries caused in another state, and one in which they may limit their liabilities, even though the action is brought in the latter state.³⁴ As said in the above case, "One state cannot be made the dumping ground for lawsuits between citizens of another state when they cannot recover from each other in their own state, where they made the contract." But if the law of the state in which the contract is made is not pleaded or shown, it will be presumed to be the same as that in which the suit is brought,³⁵ especially where the common law prevails in the latter state. While this is the general rule, yet there may be exceptions to it, founded upon the supposed intention of the parties, gathered from surrounding circumstances. Thus, if it be gathered from circumstances surrounding the particular case that it was the intention of the parties to be bound by the laws of the state in or through which the message was sent, and not by those of the state in which the contract of sending was made, the rule of law in the former state must control in the construction of the contract.³⁶ It is also a general rule that a contract will not be enforced if it would be against the policy and institution of the state in which it is sought to be enforced.

§ 375. Stipulation for repeating messages.

The blanks commonly used by telegraph companies contain a stipulation to the effect that they will not be liable for errors, delays or non-delivery of messages for more than the amount received by them for transmission, unless the same is ordered to be repeated. The stip-

³³ *West., etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; *Liverpool, etc., Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. R. 469; *Dyke v. Erie, etc., R. Co.*, 45 N. Y. 113, 6 Am. Rep. 43.

³⁴ *Show v. Postal, etc., Cable Co.*, 79 Miss. 670, 31 So. 222, 89 Am. St. Rep. 666, 56 L. R. A. 486; *Bartlett v. Col-*

lins., 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928.

³⁵ *Palmer v. Atchison, etc., R. Co.*, 101 Cal. 187, 35 Pac. 630.

³⁶ *Burnett v. Pennsylvania R. Co.*, 34 Atl. 972; *Clark on Contracts*, 503; *Whart. Conf. L.* 388; *Story, Conf. L.* 371, § 244.

ulation has not varied in form or language from that now used by the Western Union Telegraph Company. It provides that: "To guard against mistakes, the sender of the message should order it repeated, that is, telegraphed back to the original office. For repeating, one-half the regular rate is charged in addition. And it is agreed between the sender of the following message and this company, that the said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any un-repeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated messages beyond fifty times the sum received for sending the same, unless specially insured."

§ 376. Same continued—validity of such a stipulation.

The validity of the stipulations in the blank form by which these companies have attempted to exonerate themselves for all losses caused by errors made in the transmission or delays in delivering messages, except the amount received for sending, unless the message is ordered to be repeated, has been variously viewed by the courts; yet the weight of authority is, that they are void and unenforceable.³⁷

³⁷ *Alabama*.—*American U. Tel. Co. v. Dougherty*, 89 Ala. 191, 7 So. 660; *West. U. Tel. Co. v. Crawford*, 110 Ala. 460, 20 So. 111; *West. U. Tel. Co. v. Chamblee*, 122 Ala. 428, 25 So. 232.

Arkansas.—*West. U. Tel. Co. v. Short*, 53 Ark. 434.

Colorado.—*West. U. Tel. Co. v. Graham*, 1 Colo. 239, 9 Am. Rep. 136.

Georgia.—*West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480.

Illinois.—*Tyler v. West. U. Tel. Co.*, 66 Ill. 421, 14 Am. Rep. 38; *West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *West. U. Tel. Co. v. Harris*, 15 Ill. App. 347; *North Packing, etc., Co. v. West. U. Tel. Co.*, 70 Ill. 275.

Indiana.—*West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *West. U. Tel. Co. v. Todd*, 22 Ind. App. 701; *West. U. Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am.

Rep. 744; *West. U. Tel. Co. v. Adams*, 87 Ind. 598, 44 Am. Rep. 777; *West. U. Tel. Co. v. Meek*, 49 Ind. 53.

Iowa.—*Sweetland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285; *Mandville v. West. U. Tel. Co.*, 37 Iowa 214, 18 Am. Rep. 8.

Kentucky.—*West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; *Postal Tel. Cable Co. v. Scheafer*, 62 S. W. 1119, 23 Ky. L. Rep. 344.

Maine.—*Ayer v. West. U. Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 493.

Minnesota.—*Francis v. West. U. Tel. Co.*, 58 Minn. 252, 49 Am. St. Rep. 507, 25 L. R. A. 406, 59 N. W. 1078.

Missouri.—*Reed v. West. U. Tel. Co.*, 135 Mo. 661; 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609, overruling

These courts considered these stipulations as a mere device for avoiding liabilities for acts of their own negligence or willful wrongs. As has been seen, they cannot enforce any regulation or contract, by means of which they may relieve themselves for any losses caused by their own negligence or that of their servants. Any rule which seeks to relieve them from exercising their employment with diligence, skill and integrity contravenes public policy as well as the law,³⁸ and whenever they attempt to avoid these duties, they do so at the expense of and injury to their patrons.³⁹ These companies claim that, as they are required to exercise very great care and diligence in making an accurate transmission of messages, this is the best means of performing this duty, and for this reason the regulation is a reasonable one. This is unquestionably true, but that is no reason why they should not in the exercise of reasonable care in transmitting the messages delivered to them, repeat such messages in order to avoid mistakes and errors, irrespective of an agreement to that effect. It does not require very much more time to repeat the message, and the expense is but little increased.

§ 377. Same continued—further reasons for their own protection.

These companies have accepted valuable privileges from the public, and in consideration of these they have undertaken to do certain

Wann v. West. U. Tel. Co., 37 Mo. 472, 90 Am. Dec. 395.

Nebraska.—*West. U. Tel. Co. v. Lowry*, 32 Neb. 732, 49 N. W. 707; *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363; *West. U. Tel. Co. v. Beals*, 56 Neb. 415, 71 Am. St. Rep. 682, 76 N. W. 903.

North Carolina.—*Brown v. Postal Tel. Cable Co.*, 111 N. Car. 187, 16 S. E. 179, 17 L. R. A. 648, 32 Am. St. Rep. 793, overruling *Lassiter v. West. U. Tel. Co.*, 89 N. Car. 334; *Thompson v. West. U. Tel. Co.*, 107 N. Car. 449, 12 S. E. 447.

Tennessee.—*Marr v. West. U. Tel. Co.*, 85 Tenn. 529; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 4 L. R. A. 660, 10 Am. St. Rep. 699.

Texas.—*West. U. Tel. Co. v. Burrow*, 10 Tex. Civ. App. 122, 30 S. W.

378; *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653; *West. U. Tel. Co. v. Tobin*, 56 S. W. 540; *West. U. Tel. Co. v. Norris*, 25 Tex. Civ. App. 43, 60 S. W. 982; *West. U. Tel. Co. v. Ragland*, 61 S. W. 421; *Mitchell v. West. U. Tel. Co.*, 12 Tex. Civ. App. 262, 33 S. W. 1016; *West. U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539.

Utah.—*Wertz v. West. U. Tel. Co.*, 7 Utah 446, 13 L. R. A. 510n, 27 Pac. 172.

Vermont.—*Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 4 L. R. A. 611n, 15 Am. St. Rep. 917, 17 Atl. 736.

Wisconsin.—*Thompson v. West. U. Tel. Co.*, 64 Wis. 531, 54 Am. Rep. 644.

³⁸ *West. U. Tel. Co. v. Blanchard*, 68 Ga. 229, 45 Am. Rep. 480.

³⁹ *Ayer v. West. U. Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495.

duties for the public—that is, to exercise due care in transmitting all messages presented to them after payment of the charges; and to exercise due diligence to find and deliver to the addressee a copy of the same. In order for them to perform these duties, they must provide themselves with proper and suitable instruments, and employ skilled operators. When a message is presented, with payment of charges, the sender has done what the law requires of him. He has performed his part of the contract entered into between him and the company, the same being that which the latter holds itself out to the public to be ever willing and ready to perform. It then devolves upon the company to comply with its part of the contract—that is, to exercise good faith, due care and diligence in the transmission and delivery of the message. As was said: “If their wires and instruments are in proper order, and their operators skillful, and careful, it will traverse the wires precisely in the words and figures which composed it when placed upon the wires, and is sure, in that shape and form, to reach its destination, no atmospheric causes intervening to prevent.”⁴⁰ To hold that a company could exempt itself from any liability by such a stipulation would be relieving it from duties which have been placed upon it in exchange for a valuable right which none save it could enjoy—the right of eminent domain. They are as much bound to perform this duty as a public carrier is to deliver safely the goods in its charge.

§ 378. Same continued—extra charge—no increase of duty.

The additional charges for repeating the message do not increase the duty which the company owes to the public, and that which was prescribed inferentially in the granted privileges. There is nothing on the part of the sender's contract which could be considered as increasing this duty. It is not such a charge as to make the company insurers,⁴¹ since they are not so held by the common law. It is not a contractual consideration, for there is nothing given by the company in return for the consideration. Then, it must only be an additional source of revenue to the company and a protection to the latter for its own negligence; it can be nothing else—a free gift which is within

⁴⁰West. U. Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 280.

⁴¹Tyler v. West. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 51.

the discretion of the sender to make. The sender presents a telegram to be sent and the company says what it will charge for sending same; this being paid, the company must then exercise that care and diligence in transmitting and delivering the message correctly that any person would exercise under similar circumstances, for himself. How this duty must be performed is left entirely with the company. If it should deem it proper and advisable that the message should be repeated in order to determine whether or not the duty had been performed, then it should repeat the message,⁴² and that, too, without any extra charge or consultation with the sender. If it cannot correctly transmit messages without repeating them, they should be repeated, but in either instance, it cannot exempt itself from losses caused by a failure to transmit correctly.

§ 379. Same continued—delay in delivery—non-delivery.

Another reason why these stipulations should not be binding is, that they are not provided for with a view to enable these companies to make a correct transmission of messages, but rather to protect them from liability. In these contracts it is stipulated that the company will not be liable for a failure to make a prompt delivery, or, in other words, they will not be liable for losses caused by a delay in the delivery or non-delivery of the message, unless it is ordered to be repeated. As it may be clearly seen, the object in repeating a message is to ascertain whether it has been correctly transmitted and not whether it has been promptly delivered at all. If, after having the message repeated, it was ascertained that it had been correctly transmitted, this fact would not remedy a loss caused by a failure to deliver promptly or for a non-delivery. To exonerate a company from losses caused by acts of the company which could not be prevented by repeating the message, would of course be absurd.⁴³ As will be seen, some courts hold that while the stipulation may be reasonable in so far as its object is to protect the company from loss caused by errors made in the transmission, yet it is not reasonable when its further object is to protect the company from loss caused by a delay in delivery or for non-delivery.

⁴² *Ayer v. West. U. Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 355, 10 Atl. 495.

⁴³ *Thompson on Electricity*, § 241.

§ 380. Same continued—not a contract—compared to a bill of lading.

Whether or not the paper on which the sender writes the message, and to which he attaches his name, is a contract and such as will bind him to all the stipulations contained therein, depends upon circumstances⁴⁴ which will be discussed hereafter. The general rule is, that a receipt or bill of lading, when assented to by the consignor, is a contract between him and the shipper, and all reasonable stipulations therein contained are binding on both.⁴⁵ In order, however, for the receipt or bill of lading to be binding, the minds of the parties, as in other cases, must meet; that is, the terms of the contract must be accepted and assented to by the consignor. It has been held that when the terms of the bill of lading, or the stipulations contained therein, are sufficiently clear and conspicuous, and the consignor has signed his name thereto, this fact is *prima facie* evidence that he has assented to the terms of the contract. The blank forms furnished by telegraph companies to their patrons, and on which the messages are required to be written cannot be compared with the receipts or bills of lading of carriers, with respect to their contractual nature, because the contract is not the same. One of the main incidents to telegraph companies is to accomplish their purposes in the shortest time possible. Quickness and celerity is the life and main-spring of their existence. It is seldom that a person applies to these companies for service unless his business is of the utmost importance and, therefore, needs immediate attention. For these reasons he has not time to deliberate and consider the stipulations contained in these blank forms and reject them if they should not be acceptable. This is not always the case with the consignor of goods. In the latter case the advantages of each are more equal. There is also something given by the carrier to the consignor, in the nature of consideration, to enforce the stipulation, which is not given in the former case, and which will be hereafter considered. It may be proper to

⁴⁴ Tyler v. West. U. Tel. Co., 61 Ill. 421, 14 Am. Rep. 45.

⁴⁵ Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Cincinnati, etc., R. Co. v. Pontins, 19 Ohio St. 221, 2 Am. Rep. 391; Hill v. Syracuse, etc., R. Co.

73 N. Y. 351, 29 Am. Rep. 163; Erie etc., R. Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51; Mobile, etc., R. Co. v. Weiner, 49 Miss. 725; Levering v. Union Transfer, etc., Co., 42 Mo. 88.

state here, that where the stipulations are reasonable, the same rule will apply to both of these companies. The above variance in the application of the rule is where it is necessary that a special express contract shall be made to exempt these companies from the usual common-law liabilities.

§ 381. Same continued—contract—no consideration.

It is a general rule of the law of contracts that, in order for an agreement between two parties to be valid and enforceable, their minds must not only come together at the same time with respect to the same subject matter, but there must be a mutual consideration. In the cases in which the courts held that the receipts or bills of lading were contracts, there were mutual considerations. The consignor agreed to release the carrier of some of the common-law liabilities in consideration of the latter making a reduction in the charges for shipping.⁴⁶ In the case of a telegram, however, the facts are different. It is very clear that there is an additional charge exacted of the sender, and it is presumed to be a consideration; but, in order for it to be such, there must be given something in return for its value, and unless there is, the first is not a consideration, but rather a gift—as said, an additional source of revenue. Telegraph companies are public servants, and it is their duty as such to exercise a very great degree of care to make correct and accurate transmission of all messages tendered to them. In order to do this it devolves upon them to employ skilled and competent servants⁴⁷ and prepare themselves with all the modern facilities and improvements. Then, any act on the part of the sender in compensating them additionally for repeating the message, increases this obligation or duty. These companies hold themselves out to the public to be ready and willing to perform certain duties with the greatest degree of care and fidelity. Then, is it possible for them or any other party entering into a contract for a valuable consideration, to promise and not to promise, or to create and not to create an obligation or duty, at one and the same moment and by one and the same act? The inconsistency and impos-

⁴⁶ *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 50. Compare *L. C. R. Co. v. Morrison*, 19 Ill. 136.

⁴⁷ *Sweetland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 292.

sibility of such things are obvious.⁴⁸ A further question which presents itself is, Can this stipulation be considered a contract whereby the company has bound itself as an insurer? These companies are not insurers under the common law and, unless made so either by statute or by a special express contract to that effect, they will be required to exercise only the greatest degree of care, and not as insurers of absolute correct transmission of messages under any and all circumstances. They may, as has been seen, bind themselves as insurers, but in order to do so, it must be done by an express contract made by a properly authorized officer of the company. The amount of the risk must also be specified in the contract, and paid at the time of sending the message.⁴⁹ So, it is very clear, that for these reasons, these stipulations cannot be considered contracts whereby the companies bind themselves as insurers. Neither can it be said that there is any consideration given by these companies in exchange for the extra charges paid by the sender for repeating the message.⁵⁰

§ 382. Same continued—duress.

These companies have become very important factors in the commercial world, and, in fact, they have become almost matters of necessity, without which the progress of our country would be seriously retarded.⁵¹ Being of such vital interest to our commercial welfare, and clothed with many privileges and exemptions not enjoyed by the people at large, they must exercise their business with care and fidelity and not take any advantage of their position over the patrons who seek their services. As has been said, their services are most often employed at a time when the party employing them is not in a position to consider contracts which attempt to exempt them from performing their public duties, and at a time when the employer would be willing to undergo almost any risk to accomplish the purpose for which the message is to be sent. To give the companies the power to enforce these stipulations would not only have a tendency to destroy and ham-

⁴⁸ *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 444.

⁴⁹ *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 50.

⁵⁰ *West. U. Tel. Co. v. Tyler*, 74 Ill.

168, 24 Am. Rep. 281; *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452.

⁵¹ *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 130.

per the objects for which they were incorporated, but it would also give them the power to take advantage of their situation, and be able to enforce a contract induced by a species of moral duress.⁵² The weight of authority, for these reasons, seems to be opposed to upholding such stipulation.⁵³

⁵² "If it be a contract, the sender entering into it was under a species of moral duress. His necessities compelled him to resort to the telegraph as the only means through which he could speedily transact the business in hand, and was compelled to submit to such conditions as the company, in their corporate greed, might impose and sign such papers as the company might present. Credentials, rules and regulations, such as the company is authorized by statute to establish, cannot be understood to embrace such regulations as shall deprive a party of the use of their instrumentality, save by coming under most onerous and unjust conditions." *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 51. In *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611n, 15 Am. St. Rep. 917, the court, said: "Telegraph companies do not deal with their employers on equal terms. There is a necessity for their employment. . . . Neither the commercial world nor the general public can dispense with their services. It is, therefore, just and reasonable that they should not be allowed to take advantage of their situation, and of the necessities of the public, to exact exemption from that measure of duty that the law imposes upon them, and that public policy imposes." See, also, *Dorgan v. West. U. Tel. Co.*, 1 Am. L. T. Rep. N. S. 406; *West. U. Tel. Co. v. Griswold*, 37 Ohio St. 311, 41 Am. Rep. 500; *Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496.

⁵³ *West. U. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649; *American U. Tel. Co. v. Dougherty*, 89 Ala. 191, 7 So.

660; *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *West. U. Tel. Co. v. Meek*, 49 Ind. 53; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *West. U. Tel. Co. v. Harris*, 19 Ill. App. 347; *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *West. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Sweetland v. Illinois, etc., Tel. Co.*, 27 Iowa 433, 1 Am. Rep. 285; *Ayer v. West. U. Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495; *West. U. Tel. Co. v. Lowry*, 32 Neb. 732, 49 N. W. 707; *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064 (stipulation declared invalid by statute); *Brown v. Postal Tel. Cable Co.*, 111 N. C. 187, 16 S. F. 179, 17 L. R. A. 648, overruling *Lassiter v. West. U. Tel. Co.*, 89 N. Car. 334; *Marr v. West. U. Tel. Co.*, 85 Tenn. 529, 3 S. W. 496; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; *Wertz v. West. U. Tel. Co.*, 7 Utah 446, 27 Pac. 172, 13 L. R. A. 576n; *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611n, 15 Am. St. Rep. 917; *Thompson v. West. U. Tel. Co.*, 64 Wis. 531, 84 Am. Rep. 644; *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *West. U. Tel. Co. v. Richmond*, 8 Atl. 171; *Birney v. New York, etc., Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *Monville v. West. U. Tel. Co.*, 37 Iowa,

§ 383. When requested to be repeated—question of fact.

In those jurisdictions in which it is held that telegraph companies may exempt themselves from losses caused by errors made in the transmission of messages, unless the same is ordered repeated, it is a question of fact to be decided by a jury as to whether or not the company was ordered to repeat the message. In a certain case, deciding this point, when it appeared that on receipt of the dispatch the plaintiff, the addressee, went at once to the operator and requested him to ask the sender whether certain words were "five six" or "five sixty," it was held that this amounted to a request by the plaintiff to have the message repeated, and that it was immaterial whether or not the forms established by the company for the repeating of messages were complied with.⁵⁴

§ 384. Same continued—binding on sender only.

The above case was brought by the addressee and not by the sender; it seems that the stipulation as to repeating is not a matter to be considered—except under certain circumstances—when the suit is brought by the addressee. "The receiver can be guided or informed solely by what is delivered to him, and has no opportunity to agree upon any such conditions before delivery."⁵⁵ But whether this is always the case depends upon the view in which the addressee's right of action is regarded. It was held, in one case, that the express stipulation in the contract of sending binds the receiver as well as the sender,⁵⁶ and it is considered by Mr. Thompson, in his work on Electricity, that in so far as the receiver's right of action rests in contract, he is bound by the agreement entered into by the sender as much so as the sender himself. But, "if the telegraph company, when it delivers an erroneous message to the person to whom it is addressed by the sender, puts itself in the condition of a mere tort-

214, 18 Am. Rep. 8; U. S. Ex. Co. v. Backman, 23 Ohio St. 155; Lamb v. Camders, etc., Co., 46 N. Y. 271, 7 Am. Rep. 327; So. Ex. Co. v. Moon, 39 Miss. 822.

⁵⁴ West. U. Tel. Co. v. Laudis, 21 Am. & Eng. Cas. (Pa.) 206.

⁵⁵ De La Grange v. Southwestern Tel. Co., 25 La. Ann. 383; Tobin v. West. U. Tel. Co., 146 Pa. St. 375. 20 Atl. 324, 28 Am. St. Rep. 802.

⁵⁶ Aiken v. West. U. Tel. Co., 5 S. Car. 358.

feasor, one guilty of a misfeasance toward a stranger by which that stranger has incurred a loss, then this conclusion (i. e., that the receiver is not bound) is supportable."⁵⁷

§ 385. Times within which claims are to be presented.

The blank forms on which the messages are to be written generally contain stipulations providing that all claims against the company for failure to transmit messages correctly must be presented in writing, and within a certain prescribed time. The language of these stipulations is generally as follows: "The company will not be liable for damages or statutory penalties, in any case, where the claim is not presented in writing within thirty days after the message is filed with the company for transmission." When the sender signs these forms, these stipulations enter into and become a part of the contract of sending.⁵⁸ There is a difference of opinion on this subject, as to whether they are reasonable and enforceable, but the better weight of authority is that they are valid stipulations. They do not at all exempt or relieve the company from performing its duties in a faithful, diligent and careful manner, being still held to the same responsible duty. Neither does it lead to an affirmance of a right to contract for relief against responsibilities for negligence; nor does it put them in the power of the company to nullify or evade the law;⁵⁹ but such stipulations do relieve the company somewhat

⁵⁷ Thompson on Electricity, § 237.

⁵⁸ Hill v. West. U. Tel. Co., 85 Ga. 425; West. U. Tel. Co. v. Way, 83 Ala. 542, 4 So. 844; West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; West. U. Tel. Co. v. Cobbs, 47 Ark. 344; 1 S. W. 558; West. U. Tel. Co. v. Dunfield, 11 Colo. 335; West. U. Tel. Co. v. Meredith, 95 Ind. 23; West. U. Tel. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 713; West. U. Tel. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894; West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224n; Cole v. West. U. Tel. Co., 33; Minn. 227; Mas-sengale v. West. U. Tel. Co.,

17 Mo. App. 257; Young v. West. U. Tel. Co., 65 N. Y. 163; Wolf v. West. U. Tel. Co., 62 Pa. St. 83; West. U. Tel. Co. v. Rainis, 63 Tex. 27; West. U. Tel. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715; Hartzog v. West. U. Tel. Co., 84 Miss. 448, 36 So. 539, 105 Am. St. Rep. 459; Hermann v. West. U. Tel. Co., 57 Wis. 562, 16 N. W. 32; Beasley v. West. U. Tel. Co., 39 Fed. 181.

⁵⁹ Harris v. West. U. Tel. Co., 121 Ala. 519, 25 So. 910, 77 Am. St. Rep. 70; West. U. Tel. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 713; West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224n; West. U. Tel.

from being held for some alleged liabilities, about which it would be unable to make a proper and expedient defense.⁶⁰ In order, however, for these stipulations to be reasonable, the time within which the presentation is to be made must be reasonably long to enable the party claiming damages to become aware of the injury and to present his claim properly. Thus, it has been held that a stipulation was reasonable which required all claims against the company to be presented within sixty days⁶¹ after the filing of the message for transmission. It has also been held that thirty days,⁶² and even twenty days,⁶³ was a reasonable time to limit the presentation of these claims. But the reasonableness of any particular time may vary according to circumstances.⁶⁴ It was held in one case that seven days was a reasonable time to give the injured party for presenting his claim.⁶⁵

§ 386. Same continued—reasons for rule.

There is no question but that these regulations are equitable, provided the time in which they are to be made is reasonable.⁶⁶ It is a general rule that a common carrier may make and prescribe a certain limited time within which all claims must be presented. These com-

Co. v. Dougherty, 54 Ark. 221, 15 S. W. 468; So. Ex. Co. v. Colwell, 21 Wall. (U. S.) 264.

⁶⁰ Id.

⁶¹ West. U. Tel. Co. v. Way, 83 Ala. 542, 4 So. 844; West. U. Tel. Co. v. Dougherty, 54 Ark. 221, 15 S. W. 468; Hill v. West. U. Tel. Co., 85 Ga. 425; West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224n; West. U. Tel. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 713; Young v. West. U. Tel. Co., 65 N. Y. 163; Sherrill v. West. U. Tel. Co., 109 N. Car. 527, 14 S. E. 94; Wolf v. West. U. Tel. Co., 62 Pa. St. 83, 1 Am. Rep. 387; West. U. Tel. Co. v. Rains, 63 Tex. 27; West. U. Tel. Co. v. Brown, 84 Tex. 54, 19 S. W. 336; Lester v. West. U. Tel. Co. 84 Tex. 313, 19 S. W. 256.

⁶² West. U. Tel. Co. v. Dunfield, 11

Colo. 335; Cole v. West. U. Tel. Co., 33 Minn. 228; Massengale v. West. U. Tel. Co., 17 Mo. App. 257; West. U. Tel. Co. v. Culberson, 79 Tex. 65, 15 S. W. 219; West. U. Tel. Co. v. Pells, 2 Tex. L. Rev. 246; Beasley v. West. U. Tel. Co., 39 Fed. 181. Compare, Johnston v. West. U. Tel. Co., 33 Fed. 362; So. Ex. Co. v. Caperton, 44 Ala. 101, 4 Am. Rep. 118, holding such a stipulation void.

⁶³ Aiken v. West. U. Tel. Co., 5 S. Car. 358; Heimann v. West. U. Tel. Co., 57 Wis. 562, 16 N. W. 32.

⁶⁴ Massengale v. West. U. Tel. Co., 17 Mo. App. 257.

⁶⁵ Louis v. Great West. R. Co., 5 H. & N. 867.

⁶⁶ West. U. Tel. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 716.

panies are insurers of the goods intrusted to them and can only be relieved of liability for loss caused by the acts of God or the public enemy. At common law, telegraph companies are not held to the same strict liability. Then, if a common carrier can make and enforce such stipulations, there should be a greater reason why telegraph companies should do so.⁶⁷ These stipulations do not operate as a limitation of the time within which suit may be brought, but they are designed merely to give the company notice of the claim, in order that it may be investigated promptly. Messages are usually destroyed after being kept six months, and the company's ability to defend would naturally be affected by a delay in its being informed of a claim. If a sender of a message has sustained a loss by the failure of the company to properly transmit it, he could very easily ascertain this fact within sixty, thirty, twenty, or even within a shorter time, after the message was filed, and it would be no unreasonable rule to require him to promptly notify the company of this fact in order that the latter might remedy the loss or defend itself for such. The object in transacting business over telegraph lines is to accomplish the desired results in the shortest time possible, and surely the sender of the message would find out very soon after it was filed whether or not the message had accomplished its purpose; and it would be no burden or inconvenience on his part to notify the company that the objects had not been accomplished, to his loss. The presumptions are, that if he fails to notify the company of the improper transmission of the message, the rights acquired under this agreement are waived.⁶⁸ Another reason justifying the reasonableness of the provision for notice of the claim, is found in the multitude of messages transmitted requiring a speedy knowledge of claims to enable the company to keep an account of its transactions, but, by reason of their great number, they cease to be within their recollection and control.⁶⁹

⁶⁷ *Wolf v. West. U. Tel. Co.*, 62 Pa. 85, 1 Am. Rep. 387.

⁶⁸ *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 716.

⁶⁹ *Wolf v. West. U. Tel. Co.*, 62 Pa. 85, 1 Am. Rep. 387.

§ 387. Same continued—statutory penalty—applicable.

In many states there are statutes which impose a penalty upon telegraph companies for a failure to properly perform their duties, and the question has come up in several instances as to whether these stipulations were applicable to such claims. In some states, as in Arkansas, it has been held that they were not applicable.⁷⁰ In Georgia it is held that while the stipulation does not apply to claims for the statutory penalty, it does apply to all claims for special damages, and operates not only against the sender of a message, but also against the receiver, where the message is in reply to a previous message sent by the receiver.⁷¹ While this is the holding in some states, the majority of the states hold, however—and the preponderance of authority is to that effect—that these stipulations are as applicable to statutory penalties as they are to any other claims.⁷²

§ 388. Same continued—not to be prosecuted by the public.

As was ably said by Judge Elliott on this subject: "The penalty provided by the statute is given to one who contracts with a telegraph company for the transmission of a message, and it is not a penalty recoverable by public prosecution, but is one for which a civil action will lie. Nor is the civil action for the benefit of the public, for the formal right of action and the entire beneficial interests are exclusively in the individual who contracts with the company in the particular instance. The case is therefore entirely unlike public prosecutions for offenses affecting the community at large, which are conducted by public officers and in which individuals have no private interest. Penalties given exclusively to private individuals may be compounded, while penalties prescribed for purely public offenses cannot be, even though part of the penalty be given to the informer."⁷³ But it has been held that these stipulations were not applicable to an addressee who was attempting to recover the statutory penalty.⁷⁴ And in order for the company to take advantage of the

⁷⁰ West. U. Tel. Co. v. Cobbs, 47 Ark. 344, 1 S. W. 558, 58 Am. Rep. 756.

⁷¹ West. U. Tel. Co. v. James, 90 Ga. 254, 16 S. E. 83.

⁷² West. U. Tel. Co. v. Jones, 95 Ind. 228, 18 Am. Rep. 713; Barrett v. West.

U. Tel. Co., 42 Mo. App. 546; West. U. Tel. Co. v. Meredith, 95 Ind. 93.

⁷³ West. U. Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224n.

⁷⁴ West. U. Tel. Co., v. McKibben, 114 Ind. 511, 14 N. W. 890.

plaintiff's failure to present the claim within the required time, it must be specially pleaded.⁷⁵

§ 389. Stipulation held void as against public policy.

It is held in some jurisdictions that these stipulations, requiring all claims against telegraph companies to be presented within a certain fixed time, are void in that they are against public policy and as an attempt to establish limitations which are fixed by the general statutes of limitation.⁷⁶ As was said: "It would introduce into the local jurisprudence of every state, territory and country, a species of private statutes of limitation or non-claim. It would avoid the policy of the state in the matter of the time in which actions, both in tort and contract, should be brought."⁷⁷ Another reason why the stipulation is not reasonable is that it furnishes the company a means of avoiding liability for its negligence, in that the injured party may possibly not know of his loss in time to comply with the requirements of the stipulation.⁷⁸ In Nebraska it is held that if these stipulations are viewed as a contract between the telegraph company and the sender, they are void, as there is no consideration given.⁷⁹ It will be observed, however, that in most of the cases which hold that these stipulations are unreasonable and void, the validity of these stipulations was denied on the ground that they could not be made applicable to actions for the statutory penalty, or to the addressee.⁸⁰ Thus, in Indiana it has been held that an addressee of a message, suing to

⁷⁵ West. U. Tel. Co. v. Seircle, 103 Ind. 227.

⁷⁶ Johnston v. West. U. Tel. Co., 33 Fed. 362; West. U. Tel. Co. v. Eubanks, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; Francis v. West. U. Tel. Co., 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 466, 49 Am. St. Rep. 507; Pac. Tel. Co. v. Underwood, 37 Neb. 315, 55 N. W. 1057, 40 Am. Rep. 490.

⁷⁷ West. U. Tel. Co. v. Longwill, 21 Pac. 339.

⁷⁸ In Johnston v. West. U. Tel. Co., 33 Fed. 362, the court said: "Is a stip-

ulation which has the effect to preclude from the right of action the person to whom a prepaid telegram is directed and to whom it has never been delivered, no matter how gross the negligence of the company may be, a reasonable regulation? In the opinion of this court it is clearly unreasonable and is contrary to public policy."

⁷⁹ Pac. Tel. Co. v. Underwood, 37 Neb. 315, 40 Am. St. Rep. 480, 55 N. W. 1057.

⁸⁰ Johnston v. West. U. Tel. Co., 33 Fed. 362.

recover damages, is not bound by these stipulations, although the validity in other respects is recognized.⁸¹ In Texas these stipulations are valid so long as the time for filing the claim is not less than thirty days,⁸² but if the time is made any number of days less than thirty, they become void.⁸³ In other states these stipulations are held invalid in that they are prohibited by positive statutory provisions.⁸⁴

§ 390. When limitation begins to run.

These limitations, within which claims must be presented to the company, begin to run from the time specified in the stipulation. They are for the exclusive benefit of the company and are in the nature of conditions precedent to the bringing of a suit, and in order for the injured party to take advantage of his loss, he must comply with the terms of the conditions.⁸⁵ As they are for the benefit of the company, and must be complied with by the party injured, the former must also be held to their conditions.⁸⁶ The principal condition in the stipulation is, that the claim must be presented within a certain fixed time. The question, then, which presents itself is, When does the limitation begin to run? In the old blank form, used by these companies for message blanks, the wording of these stipulations was different from that now in use. The old form provided for a presentation within "sixty days after sending the message." Under this form many decisions arose, and it was held in all these that the limitation did not begin to run until after the message was actually sent; so, if there was a total failure to transmit, the limitation would not apply.⁸⁷ Under the present forms used by these com-

⁸¹ West, *U. Tel. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894.

⁸² Tex. Rev. Stat. 1895, Art. 3379.

⁸³ West, *U. Tel. Co. v. Jobe*, 6 Tex. Civ. App. 463, 25 S. W. 168, 1036.

⁸⁴ West, *U. Tel. Co. v. Eubanks*, 100 Ky. 591, 36 L. R. A. 711, 66 Am. St. Rep. 361; *Donio v. West. U. Tel. Co.*, 107 Ky. 527, 92 Am. St. Rep. 371; *Pac. Tel. Co. v. Underwood*, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490; West, *U. Tel. Co. v. Kemp*, 44

Neb. 194, 48 Am. St. Rep. 723, 62 N. W. 451.

⁸⁵ West, *U. Tel. Co. v. Way*, 83 Ala. 542, 4 So. 849.

⁸⁶ West, *U. Tel. Co. v. Trumbull*, 1 Ind. App. 121; West, *U. Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 2 L. R. A. 224n.

⁸⁷ See note 86 for reference cases. See, also, *Sherrill v. West. U. Tel. Co.*, 109 N. Car. 527, 14 S. E. 94.

panies, it is provided that the company will not be liable for damages or for statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission. There have been but few decisions on these new forms with respect to the time when the limitation begins to run. In these cases it was held that the decisions under the old form were applicable under the new on the ground that these companies could not avail themselves of any provision in a contract which they failed to accept.⁸⁸ We think this is the proper construction to be placed on these stipulations.

§ 391. Same continued—delay in receiving messages—does not modify stipulation.

The fact that the addressee does not receive the message for some time after it has been transmitted does not modify the stipulation by giving the injured party more time, although the company has negligently delayed the message; provided, however, he has a reasonable time to present the claim after his knowledge of the error.⁸⁹ And the mere fact that the exact amount of the damage suffered by the addressee cannot be ascertained within sixty days, is no excuse for his failure to present his claim within that time.⁹⁰ He should present his claim within the specified time; and, if he should learn after the expiration of the time of other damages, the claim may be so amended as to include these latter damages. The claim should be presented within the limitation, if it should be reasonable in the particular instance, and if the court should instruct the jury that the time does not begin to run until after the error has been learned, or the breach of the company's duty has been known by the injured party, it will be an error.⁹¹ If the complaint shows that the message was never delivered, the action having been instituted by the receiver, it is not demurrable merely because it fails to allege that the claim was made within the limitation.⁹²

⁸⁸ West. U. Tel. Co. v. Michaelson, 94 Ga. 436, 21 So. 169.

⁸⁹ Heiman v. West. U. Tel. Co., 57 Wis. 562, 16 N. W. 32; Massengale v. West. U. Tel. Co., 17 Mo. App. 258; West. U. Tel. Co. v. Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638.

⁹⁰ Manier v. West. U. Tel. Co., 24 Tenn. 442.

⁹¹ West. U. Tel. Co. v. Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638.

⁹² Sherrill v. West. U. Tel. Co., 109 N. C. 527, 14 S. E. 94.

§ 392. Same continued—unaware of wrong—not binding.

While the foregoing rules are generally accepted, yet there are exceptions, as where the time is not reasonable. In order for any rule to be binding, it must be reasonable. *Cessante ratione, et ipse lex*. The length of time given in these stipulations is presumed to be reasonably long to give the injured party ample time to file his claim with the company; but should it appear that he did not become aware of the wrong until after the expiration of the limitation, and this was no fault on his part; or, if he does not have a reasonable time to file the claim, after he becomes aware of the company's breach of duty; or, if for any reason he is unavoidably prevented from presenting his claim before the expiration of the limitation, but does so as soon thereafter as it is in his power, the stipulation is not binding.⁶⁰ So, it will be seen that each particular case must be considered with respect to its own surrounding circumstances. In many instances, the addressee is the only interested party to the business transaction, about and for which a message is sent, the sender's duty and interest having been completed at the filing of the message for transmission. In these cases the message may not be sent at all; or, it may be negligently delayed in its delivery by the company; of which facts, the addressee may have no knowledge whatever until after the expiration of the limitation. Under such circumstances the addressee should surely not be bound.

§ 393. Compliance with stipulation—what constitutes.

Having considered the limitation within which all claims for damages against telegraph companies must be presented, and the reasonableness of the same, we shall now set out something of what is necessary to constitute a sufficient compliance with said stipulations. First, the claim should be presented in writing; second, it should set forth in unmistakable terms the nature of the demand; and third, it should be presented to a proper agent of the company. And first, the presentation of the claim must be in writing. The object in requiring the claim to be in writing, further than for the reason that

⁶⁰ West, U. Tel. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715.

the stipulations expressly require this is, that the officers of the company, who have the power to act on such claims, may have the nature and extent of the claimant's demand directly. The claim agents would not have the opportunity to give the notices proper consideration if they were given orally through the operator; and if the nature of the claim was in dispute, in an action arising out of the claim, the written notice could, and should, be introduced to show the true nature of the demand. Another reason for holding that these claims should be in writing is, that, in the great amount of business of these companies, an oral notice would not as likely reach the proper officers of the company, where it should have proper consideration.

§ 394. Same continued—waiver of written claim.

While these companies may require the notice of the claim to be in writing, yet they may waive this right. Notices are generally presented to the local agents, who are impliedly authorized to transmit all the business connected with the messages received by them; and, in the capacity of an agent, they may have the power to waive written notices of claims for damages.⁹⁴ Thus, where the plaintiff presented an oral claim within sixty days, whereupon the company entered into a correspondence with him and made an offer in settlement in sixty days; the company's right to insist on a written notice was waived.⁹⁵ In a case where an agent, in stead of objecting to the oral complaint, requests time for investigating the merits of the claim, and after investigating, the company refuses to pay anything not upon the grounds of the insufficiency of the demand but upon the non-liability of the company; it was held that⁹⁶ this constituted a waiver of the right to demand a written notice. But the promise of an agent, when the complaint is made orally, to look into the matter, is not a waiver of the right.⁹⁷ And where the complaint was

⁹⁴ West. U. Tel. Co. v. Stratemier, 6 Ind. App. 125, 32 N. E. 871; Hill v. West. U. Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; Hays v. West. U. Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 81.

⁹⁵ West. U. Tel. Co. v. Stratemier, 6 Ind. App. 125, 32 N. E. 871.

⁹⁶ Hill v. West. U. Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; West. U. Tel. Co. v. Yopst, 11 N. E. 16.

⁹⁷ Massengale v. West. U. Tel. Co., 17 Mo. App. 257.

made to a telegraph operator, who expressed the opinion that there was no liability, he having no authority to represent the company in such matters, it was held that there was no waiver.⁹⁸ If a message is written and paid for as a night message, which contains a stipulation to the effect that all claims arising out of the improper transmission shall be presented in thirty days, and it is orally agreed that the message shall not be transmitted until the next morning, this does not of itself waive the right to demand the claim in writing, although the other part of the contract may be changed.⁹⁹

§ 395. Same continued—nature of the claim.

The claim should set out fairly the nature and extent of the claimant's demand. The object of this requirement is to give the company cognizance of facts creating the liability, in order that it may use these for investigating the cause of the loss or injury. It is impossible for these companies to keep up with all the mistakes of their employees, and the injuries arising therefrom; and, while they may be clearly liable for claims presented—and for which they would readily, without suit, indemnify the injured party—yet, if they have no facts on which to base an investigation in order to determine whether they are liable, they would, very probably, be heavily taxed with an expensive litigation. So, if the plaintiff should have good grounds to recover damages, he should impart these facts to the company, in order to avoid litigation; and on these only could he recover.¹⁰⁰ He should also state the extent of the injury; however, he will not be limited to the amount set forth in his claim, for, as said before, the extent of the damages may not be known until after the claim shall have been presented. In a case on this point, a claim was presented by a sender, classifying the damages as "fifty dollars actual damages and five thousand dollars exemplary damages." At the trial, the jury returned a verdict for five hundred dollars actual damages alone. It was held, that the plaintiff was not prejudiced by his classification, so the verdict was allowed to stand. The court.

⁹⁸West. U. Tel. Co. v. Rains, 63 Tex. 27.

⁹⁹West. U. Tel. Co. v. Culberson, 79 Tex. 65, 15 S. W. 219.

¹⁰⁰West. U. Tel. Co. v. Murray, 29 Tex. Civ. App. 207, 68 S. W. 549; Swain v. West. U. Tel. Co., 12 Tex. Civ. App. 385, 34 S. W. 783.

said: "The claim was for five thousand and fifty dollars in the aggregate, and served in all respects to give the defendant the information stipulated for."¹⁰¹

§ 396. Must be presented to proper officer.

As to what will amount to a sufficient presentation of a claim must depend somewhat upon the circumstances of the case. A representation to the resident agent of the company, who made the contract to transmit the message, was held a sufficient presentation,¹⁰² although such agent had no authority to settle the claim. The manager of the company's office, at the place from or to which a message is sent, is a proper party to whom a presentation may be made.¹⁰³ Where the plaintiff informed the operator of a mistake made in sending the message and was referred by him to the main office, where a clerk told him the manager was busy, but took down his complaint in writing and handed it to a person in another room whom he introduced as the attorney of the company, which attorney promised to investigate the matter, and, afterwards, in reply to plaintiff's inquiry, wrote a letter rejecting the claim, using paper and envelope with printed headings representing him to be the attorney of the company—this was held a proper presentation.¹⁰⁴ The party on whom the notice is served must have some authority to accept such for the company, and if the plaintiff has any information that a certain employee of the company has no authority to accept claims, then he loses his rights by serving it on such person. Thus, where a written statement of plaintiff's claim was handed by his agent to a receiving clerk of the company, who after a perusal of it, handed it back, saying he had nothing to do with it, and directing him to the general officers of the company in another part of the building, but nothing more was done until after the time had elapsed, it was held that there had not been a compliance with the condition, so the plaintiff's suit was defeated on

¹⁰¹ *Manier v. West. U. Tel. Co.*, 94 Tenn. 442, 29 S. W. 732; *West. U. Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549.

¹⁰² *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299.

¹⁰³ *Hill v. West. U. Tel. Co.*, 85 Ga.

425, 11 S. E. 874, 21 Am. St. Rep. 166; *West. U. Tel. Co. v. Yopst*, 11 N. E. 16; *Hays v. West. U. Tel. Co.*, 70 S. Car. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481.

¹⁰⁴ *Bennett v. West. U. Tel. Co.*, 2 N. Y. Supp. 365.

that ground.¹⁰⁵ And so, it has been held that a notice of claim delivered to a messenger boy, to be by him delivered to the proper agent of the company, is not sufficient compliance with the stipulation.¹⁰⁶

§ 397. Commencement of suit—whether sufficient notice.

It has been held by many courts that the commencement of a suit, within the limitation, against these companies for damages, was not a sufficient compliance with these stipulations, requiring claims to be presented within a certain fixed time.¹⁰⁷ The ground on which these courts based their decisions is that these stipulations are conditions precedent and must be filed before the commencement of a suit; and until they are complied with, the injured party has no cause of action.¹⁰⁸ As was said on the subject: "The company was entitled, unless there was a waiver, to a written claim, before the action was instituted, in order to enable it to ascertain the facts, and determine whether it would pay to restrict the claim . . . for a defendant is not to be harassed by an action until after the stipulated claim has been presented or its presentation waived?"¹⁰⁹ Under these rulings it was held that the stipulations would not be sufficiently complied with if a written claim was presented after the commencement of the suit and before the expiration of the limitation, but that this written notice would be a good ground on which to base another suit.¹¹⁰ In those jurisdictions in which these decisions were rendered, the company could waive this condition and accept the service of a suit as a sufficient notice.

§ 398. Contrary holding—better view.

There are other courts which hold that the commencement of a suit, before the expiration of a limitation, is a sufficient presentation

¹⁰⁵ *Young v. West. U. Tel. Co.*, 65 N. Y. 163.

¹⁰⁶ *West. U. Tel. Co. v. Terrell*, 10 Tex. Civ. App. 60, 30 S. W. 70.

¹⁰⁷ *West. U. Tel. Co. v. McKinney*, 5 Tex. L. Rev. 173; *West. U. Tel. Co. v. Yopst*, 11 N. E. 16; *West. U. Tel. Co.*

v. Hays, 63 S. W. 171, 67 S. W. 1072.

¹⁰⁸ *Id.*

¹⁰⁹ *West. U. Tel. Co. v. Yopst*, 11 N. E. 16, *Aff'g* 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224n.

¹¹⁰ *West. U. Tel. Co. v. McKinney*, 5 Tex. L. Rev. 173.

of claim,¹¹¹ and we are inclined to think that this is the better view to take of the subject. The object, as said before, in presenting a written notice of the claim to these companies is to enable them to ascertain whether they are liable for the damages. It is true, that it would be better to give a written notice before the commencement of a suit, so that the company might be given an opportunity to settle without expense. The main point is that the company is entitled to notice of plaintiff's claim, and either the filing of the claim or the bringing of suit within the limitation specified in the contract accomplishes this. On the other hand, it seems to us that it could be better informed of these facts by a suit, especially where the rule of procedure is that the filing of a declaration is the first step to the bringing of a suit, since it is very evident that the facts on which the liability arises are much more fully stated in the latter way, thereby giving the company a better opportunity to make a full investigation of the complaint. We do not wish to be understood as saying that the commencement of a suit is always a better way to settle these matters, but that the bringing of a suit is equivalent to a presentation of a notice of claim for damages.

§ 399. Limiting liability to specific amount.

Telegraph companies have attempted to limit their liabilities for sending night messages by reducing the charges for transmission. This is done by stipulating in the blank forms that they will not, for the consideration of said reduction, be liable beyond a certain amount. It has been held, with few exceptions,¹¹² that these stipulations were unreasonable, and so far as they sought to limit the liability of the

¹¹¹ West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; East Tennessee, etc., R. Co. v. Bayless, 74 Ala. 150; Bryan v. West. U. Tel. Co., 133 N. C. 603, 45 S. E. 938; West. U. Tel. Co. v. Mellon, 96 Tenn. 78; West. U. Tel. Co. v. Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427; West. U. Tel. Co. v. Piner, 9 Tex. Civ. App. 152, 29 S. W. 66; Phillips v. West. U. Tel. Co., 95 Tex. 638, 69 S.

W. 63; West. U. Tel. Co. v. Karr, 5 Tex. Civ. App. 60, 24 S. W. 302; West. U. Tel. Co. v. Crawford, 75 S. W. 843.

¹¹² Aiken v. West. U. Tel. Co., 5 S. C. 358; Schwartz v. Atlantic, etc., Tel. Co., 18 Hun (N. Y.) 157; Bennett v. West. U. Tel. Co., 2 N. Y. Supp. 365; Jones v. West. U. Tel. Co., 18 Fed. 717; Clement v. West. U. Tel. Co., 137 Mass. 463.

company for the consequences of its own negligence, was contrary to public policy and could not be enforced. These companies have a perfect right to make all rules and regulations, and by these they may limit, to a certain extent, their common-law liabilities; however, these rules must, under all circumstances, be reasonable and consistent with public policy. It might be possible, that they, as contracts between individuals or between the company and an individual, would be considered reasonable; but the interest the public has in these institutions, and the effect an enforcement of these would have been on the public, would make them against public policy and, therefore, void; for, where the interest of a few is conflicting with the interest of the public, the former must give way to the latter. To permit these companies, therefore, to impose these stipulations, would open to them an opportunity to exercise fraud upon the public or give them a chance to become negligent. The amount of damages to which they would be liable would be so trifling that, in many instances, they would rather pay this than to be bothered with the duties assumed. As was said: "The operator may, from stupidity or haste to close for the night, prefer to pay back the trifle paid, and leave the message unsent. Or, a message may have been carelessly, or even wantonly, thrown into the waste basket, and never sent, or if sent it may have been treated in the same manner at the office of reception, and never delivered to a carrier, or if so delivered, it may have been thrown aside or destroyed by the carrier to save himself labor or trouble. And the sender, under this rule, must be debarred from all remedy beyond a repayment of the few cents paid."¹¹³ Another reason why they are not reasonable and therefore enforceable is, that, as said at another place, the sender is not put on equal footing with the company if the stipulation is considered as a contract. In other words, it would be in the nature of a contract made under duress. And it cannot be said that a reduction of the charges for sending would increase the duty of the company to use more care in the transmission of messages.¹¹⁴

¹¹³ True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 161.

¹¹⁴ Gray on Telegraph, § 51.

§ 400. Same continued—nature of—liquidated damages.

These stipulations, in this respect, contain clauses to this effect: "In consideration of the reduced rate for which this message is sent, the company shall not be liable beyond the amount paid for transmission," or, "to ten times the amount paid for transmission," or, "to fifty times such amount where the message is repeated," or "to twenty per cent of the amount of damage;" all of such stipulations have been held unreasonable. In some jurisdictions, however, it has been held that it was an agreement made between the parties upon a certain sum, as liquidated damages.¹¹⁵ Judge Bonner said, while discussing this point: "We fail to perceive on principle, why, in such cases, the parties may not, as they did here, agree upon a sum certain in the nature of liquidated damages for an error or delay arising from a cause other than misconduct, fraud or the want of proper care."¹¹⁶

§ 401. Same continued—insured—same rule.

In other blanks furnished by these companies, there have been stipulations to the effect that they would not be liable for damages beyond a certain amount, unless the message was ordered to be repeated, or, unless an extra charge was given, in consideration of which it would insure a safe and correct transmission of the message.¹¹⁷ These stipulations have also been held unreasonable and void for the reasons as given above.¹¹⁸

§ 402. Night messages—time to be delivered.

Telegraph companies generally have two different blank forms to be furnished to their patrons, and these are to be respectively used at the time at which application is made to the company for services. For instance, they have a day message blank and a night message blank. On these two forms are to be found stipulations differing

¹¹⁵ West, U. Tel. Co. v. Neill, 57 Tex. 289, 44 Am. Rep. 589.

¹¹⁶ Id.

¹¹⁷ Brown v. Postal Tel. Cable Co., 111 N. C. 187, 16 S. E. 179, 32 Am. St. Rep. 793, 17 L. R. A. 648; Hark-T. & T. 25

ness v. West, U. Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672; West, U. Tel. Co. v. Harris, 19 Ill. App. 347; American U. Tel. Co. v. Dougherty, 89 Ala. 191.

¹¹⁸ Id.

from each other in some respect. As a general rule, the business of these companies at night is not so pressing as during the day, and for this reason they have adopted rules which are inscribed on these forms, to the effect that they will transmit messages during the night at a reduced rate, to be delivered at or by a certain time on the following morning. These stipulations do not exonerate the companies for any negligence in the transmission, or exempt them from liabilities arising from the want of due diligence in a prompt delivery, but they must exercise the same diligence in delivering these messages on the following morning as if the message had been sent as a day message. It has been held, however, that a stipulation to the effect that, in consideration of reduced rates, the company's duty to deliver shall be deemed fulfilled by a delivery by noon of the succeeding day, is reasonable and valid.¹¹⁹ This latter stipulation may be, and is, waived by a parol promise to the operator to have the message transmitted and delivered sooner.¹²⁰

§ 403. Unavoidable interruption—special contract.

As elsewhere stated, telegraph companies are often interfered with in the transmission of messages by climatic changes; in fact, this is the most serious difficulty with which they have to contend. When the means by which news could be transmitted by electricity were first brought into use, and for sometime thereafter, this difficulty was almost beyond the control of these companies; but after many years of close study by scientists on this subject, these interferences have, to a very great extent, been overcome, yet they are still often prevented from making a correct transmission of messages on account of these interferences. Not only is their business interfered with by these climatic changes, but often they are interrupted in their business by strikes. In order to guard against these unavoidable interferences, and to relieve themselves from a limited amount of liability or any liability at all, for failure or delay in the transmission of

¹¹⁹ West. U. Tel. Co. v. McCoy, 31 S. W. (Tex.) 210; West. U. Tel. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366; West. U. Tel. Co. v. Johnston, 107 Ky. 631, 55 S. W.

427. Compare Hibbard v. West. U. Tel. Co., 33 Wis. 558, 14 Am. Rep. 775.
¹²⁰ West. U. Tel. Co. v. Bruner, 19 S. W. 149.

messages caused by such interferences, they have been forced to make special contracts with the sender of messages, whereby it is agreed that the former will not be liable for losses arising therefrom; and it has been held that these contracts were valid and enforceable, both as to interferences caused by the changes of climate,¹²¹ and also by strikes.¹²² But should the operator of the company know at the time the message was received that the wires of the company were being subjected to such interferences, and knew that for this reason the message would necessarily be delayed, it is his duty to notify the sender of such fact; and, on a failure so to do, the contract cannot be used as a defense by the company.¹²³ Neither could the company use this stipulation as a defense, when the delay was caused by the wire being used to send out train orders.¹²⁴

§ 404. Over connecting lines—stipulation—exemptions.

A stipulation to this effect is found on the blanks of these companies: That the company is made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. As will be seen, by a close observance of this stipulation the company attempts to exempt itself from liabilities both over its own line and that of the connecting company, in that it represents itself as agent for the sender. As has been seen, a telegraph company may stipulate against losses caused on its own lines, when the same has not been brought about by any negligence on its own part, but this is as far as it can go by stipulation, and any scheme by which it attempts to escape this liability—as that by agency—cannot be upheld; and so far, in this respect, the stipulation is void.¹²⁵ These companies may, however, by

¹²¹ Sweetland v. Illinois, etc., Tel. Co., 27 Iowa 433, 1 Am. Rep. 285; West. U. Tel. Co., v. Graham, 1 Colo. 237, 9 Am. Rep. 136; White v. West. U. Tel. Co. 14 Fed. 710; Riley v. West. U. Tel. Co. 6 Misc. (N. Y.) 221; West. U. Tel. Co. v. Cohen, 73 Ga. 522; West. U. Tel. Co. v. Stiles, 35 S. W. 76.

¹²² Marvin v. West. U. Tel. Co., 15 Chic. Leg. N. 416.

¹²³ West. U. Tel. Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526; Pac. Postal Tel. Cable Co. v. Fleischner, 66 Fed. 899, 29 U. S. 227; West. U. Tel. Co. v. Bierhans, 12 Ind. App. 17.

¹²⁴ See note 121 for reference cases.

¹²⁵ West. U. Tel. Co. v. Seale, 45 S. W. 964.

contract, become the agent of the sender with respect to the connecting lines; and it may, therefore, stipulate against any losses caused by delays or even a failure to transmit over the connecting line, and this, too, notwithstanding the fact that this was caused by the latter's negligence.¹²⁶ The initial company has nothing to do with the operation or management of the connecting line; so, to hold it liable for any losses caused over this latter line—and against which it has stipulated—would be unreasonable and therefore void.

§ 405. Stipulation against cipher messages—valid.

There is a conflict of opinion as to whether telegraph companies can contract against errors or delays made in the transmission of cipher, or otherwise obscure messages, where the same has been assented to by the sender. Some of the courts hold that the duty of the company to send correctly messages which are written in cipher is the same as that imposed on them to transmit messages which are fully written out and clearly understood by the operator. They cannot contract against losses caused by their own negligence in transmitting messages which are clearly understood by the operator; and these courts hold that they cannot make such a contract even though it be in cipher.¹²⁷ Judge Guffy in rendering a decision on this point, said: "It is often of the utmost importance to the sender or receiver of messages that the same should be in cipher or obscure, because if sent in plain language the contents would often become known and the object in view defeated; hence, public policy forbids that appellant should by any contract exempt itself from the damages resulting from its negligence in transmitting such messages."¹²⁸

§ 406. Same continued—contrary view.

While the above is the holding of a goodly number of decisions, based on apparently plausible reasonings, yet the weight of author-

¹²⁶ See "Connecting Lines."

¹²⁷ *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; *Dougherty v. American U. Tel. Co.*, 75 Ala. 168 51 Am. Rep. 435; *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844; *West. U. Tel. Co. v. Hyer*, 22 Fla. 637, 1 So. 129, 1 Am. St. Rep. 222; *West. U. Tel. Co.*

v. Blanchard, 68 Ga. 299, 49 Am. Rep. 480; *West. U. Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *West. U. Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715.

¹²⁸ *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 66 Am. St. Rep. 368, 36 L. R. A. 711.

ity—and a better view, we think, in which to consider the subject—is to the contrary.¹²⁹ There is a distinction between the two kinds of messages out of which the duty of the company, with respect to the two arises. It is very true, that it is as much the duty of the company to exercise the same care and diligence in the transmission of one as in the other; but the duty of the company, arising out of one, may be very greatly lessened by a clearer knowledge of the contents of the message. In other words, there is no question, but that it requires a much greater degree of care to transmit accurately and correctly a cipher or obscure message than it does one which is clearly and plainly written out. Any operator or interpreter can, with a much greater degree of accuracy, communicate a message or statement when he understands the meaning of it, than he could if the message or statement was not understood. Then, it seems to us that where it does require a much greater degree of care in transmitting cipher messages, that the company might relieve itself of some of these responsibilities by a contract to that effect. It is also true that the transmission of a message in cipher is a good scheme by which the nature of the business to be accomplished may be kept secret; but, as elsewhere said, it is the duty of these companies not to divulge the contents of any message entrusted to their care. This duty has been imposed, in many states, by statutes, a violation of which would subject the company and its operators to punishment. This is a duty also imposed on these companies for public policy, a violation of which, in this sense, would subject them to an action *ex-delicto* or *ex-contractu*. So, it will be clearly seen, there is no plausible reason for holding that these contracts could be made on the ground that the contents of the message may become known. This being the condition of affairs, it seems that a contract could be entered into by which the company could exempt itself for losses caused by errors made—not negligently but after exercising due care—in the transmission of messages.

¹²⁹ *Primrose v. West. U. Tel. Co.*, 154 U. S. 1; *Cannon v. West. U. Tel. Co.*, 100 N. C. 311, 6 Am. Rep. 590; *Hill v. West. U. Tel. Co.*, 42 S. Car. 367.

20 So. 135, 46 Am. St. Rep. 734; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 1 L. R. A. 728, 10 Am. St. Rep. 772.

§ 407. Where and when messages accepted.

Another stipulation usually found on these blanks is that the liability of the company for any loss arising out of or in connection with the transmission of messages does not attach until the message is delivered to and accepted at one of its transmitting offices. This has been held, on good reason, to be a valid stipulation.¹³⁰ It is hardly necessary to go into the reason for sustaining this rule, for it is entirely too clear for argument, that the liability of the company should not attach until after the message is received at its place of business. The most essential requirement of this stipulation, however, is, that the message must have been filed in one of the transmitting offices before the error was made; and it matters not so much by whom it was delivered, provided it was accepted by a proper employee of the company. Thus, if the message was delivered to an agent of the company when absent from his office, but the same was duly filed by him on his return, and its delay occurred after such filing, the company cannot, under such circumstances, receive any protection from this stipulation.¹³¹

§ 408. Delivery to messenger—valid.

Another stipulation which is in close connection with the one discussed in the preceding section is, that if a message is sent to one of the transmitting offices of the company by one of its messengers, he acts for that purpose as the agent for the sender. This rule has been held reasonable, even though the message was delivered to one of the company's delivery messengers who was acting in that capacity at that time, provided he did not have authority from the company to receive the message.¹³² The duty of these messengers is to deliver the message to the addressee, and when this shall have been done their duty is at an end. As was said: "They are not sent out from the company's office to solicit telegrams, and being engaged in a most subordinate work of the company's service, it is presumed that they

¹³⁰ *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1018.

¹³¹ *West. U. Tel. Co. v. Pruett*, 35 St. W. 78.

¹³² *Ayres v. West. U. Tel. Co.*, 65 N. Y. App. Dev. 149; *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1018.

are not invested by the company with the powers of receiving the company's charges or fees for the transmission of telegrams." ¹³³ This stipulation affords no protection to the company, if the message, delivered by the messenger, request a reply, and the company directs the messenger to obtain from the addressee such reply. ¹³⁴ The company may, however, waive its rights acquired under the stipulation. Thus, if it has been the custom of the company to consider a delivery to the messenger a delivery to the company, it cannot obtain protection under this stipulation.

§ 409. Waiver of stipulation limiting company's liability.

Stipulations limiting the liability of telegraph companies, or fixing the time and manner of presenting claims or notices, may be waived by the company impliedly by conduct as well as expressly. ¹³⁵ Thus, where the company received a claim and acted upon it after the expiration of the time, without any objection on that account, it will be presumed that the stipulation has been waived. ¹³⁶ So, also, it is required that the claim shall be presented in writing, but if they are received and acted upon, or there is a promise to act upon them without objection by the company on this account, it will be deemed that it has made a waiver of this requirement. ¹³⁷ And a stipulation limiting the company to a certain sum is waived when the company, in adjusting the damages, agrees to pay the injured party a larger sum than that stated in the contract limiting its liability. ¹³⁸ But it has been held that an injured party has no right to rely upon the promise of one of the company's agents to waive a provision as to

¹³³ *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 98, 18 S. E. 1018.

¹³⁴ *Will v. Postal Tel. Cable Co.*, 3 N. Y. App. Div. 22.

¹³⁵ *Galveston, etc., R. Co. v. Ball*, 80 Tex. 602, 16 S. W. 441; *Hess v. Missouri Pac. R. Co.*, 40 Mo. App. 202; *Merrill v. American Ex. Co.*, 62 N. H. 514; *Glenn v. South. Ex. Co.* 86 Tenn. 594, 8 S. W. 152; *Hudson v. Northern Pac. R. Co.*, 60 N. W. (Iowa) 608.

¹³⁶ *International, etc., R. Co. v. Underwood*, 62 Tex. 21; *Hudson v. Northern Pac. R. Co.*, 60 N. W. (Iowa) 608.

¹³⁷ *Bennett v. Northern Pac. Ex. Co.*, 12 Oregon 49, 6 Pac. 160; *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314; *Atehison, etc., R. Co. v. Temple*, 47 Kan. 7, 27 Pac. 98, 13 L. R. A. 362n.

¹³⁸ *Chicago, etc., R. Co. v. Katzenbach*, 118 Ind. 174, 20 N. E. 709.

the time within which suit must be brought, when he knows that such agent has no right to adjust such claim without authority from the company.¹³⁹

§ 410. Burden of proof.

It may often become of great importance when these companies attempt to exonerate themselves from losses by these stipulations or special contracts, to determine upon whom the burden of proof rests. There is some conflict of authority upon some phases of this subject. But the proposition seems to be pretty well settled, that proof of loss, caused in the transmission or delivery of messages, generally raises a presumption of negligence or fault on the part of the company; and the burden rests upon the latter to explain or account for the loss in some way in order that it may be exonerated.¹⁴⁰ If the company claims that the loss or damage occurred from some cause excepted by the stipulation or special contract, the burden is upon the company to show that fact.¹⁴¹ As we have seen, however, the company is generally liable for its own negligence, even though the loss was from some excepted cause, occasioned by its failure to exercise due care. In many states the burden is upon the company not only to show that the loss was within the terms of the exception, but also that the loss was not caused by any negligence on its part, at least, none which was a proximate cause of the loss. There is some authority which supports the rule that, after the loss is shown to be within the exception, the burden of proof then rests upon the plaintiff to show negligence upon the part of the company.¹⁴² Eminent judges and textwriters approve the former rule, and we are inclined to think that the better reasoning is in favor of it.¹⁴³

¹³⁹ *Gulf, etc., R. Co. v. Brown*, 24 S. W. (Tex.) 918.

¹⁴⁰ *Canfield v. Baltimore, etc., R. Co.*, 93 N. Y. 532; *Grogan v. Adams Ex. Co.*, 114 Pa. St. 523, 7 Atl. 134; *Adams Ex. Co. v. Haynes*, 42 Ill. 89; *Mann v. Birchard*, 40 Vt. 326; *Chapman v. New Orleans, etc., R. Co.*, 21 La. Ann. 224, 99 Am. St. Rep. 722.

¹⁴¹ *Maghee v. Camden, etc., R. Co.*, 45 N. Y. 514; *Keeney v. Grand Trunk R. Co.*, 47 N. Y. 525.

¹⁴² *Little Rock, etc., Co. v. Talbat*, 39 Ark. 523; *The same v. Harper*, 44 Ark. 208; *Whiting v. St. Louis, etc., R. Co.*, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602; *Smith v. North Carolina R. Co.*, 64 N. C. 235; *Railway Co. v. Manchester Mills*, 88 Tenn. 653; *Buck v. Pennsylvania R. Co.* 150 Pa. St. 170 24 Atl. 678.

¹⁴³ *Id.*

§ 411. Proof of assent to stipulation.

Ordinarily a party is not bound to a rule or regulation by which a carrier seeks to limit his liability, unless the same has been brought to his notice.¹⁴⁴ But in the case of telegraph companies, the rule seems to be somewhat different. The message blank, furnished by these companies to their customers, contains contracts and stipulations which are so arranged therein that the sender, when he affixes his name thereto, is conclusively presumed, in the absence of fraud or imposition, to have assented to the terms of the contract, and is bound by all these which are reasonable,¹⁴⁵ even though he did not read or notice them, or was not able to read them.¹⁴⁶ He is presumed to have had notice of these from the fact that they are contained on the blanks and, in a sense, he has notice of them. A very common-

¹⁴⁴ *Adams v. Hayles*, 42 Ill. 89; *DeRutte v. New York, etc., Tel. Co.*, 1 Daly (N. Y.) 559, 30 How. Pr. (N. Y.) 433.

¹⁴⁵ *United States*.—*Beasley v. West. U. Tel. Co.*, 39 Fed. 181; *Primrose v. West. U. Tel. Co.*, 154 U. S. 1.

Georgia.—*Hill v. West. U. Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; *Stamey v. West. U. Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1008.

Iowa.—*Sweetland v. Illinois, etc., Tel. Co.*, 27 Iowa, 433, 1 Am. Rep. 285.

Kentucky.—*Camp v. West. U. Tel. Co.*, 1 Met. (Ky.) 164, 71 Am. Dec. 461.

Maryland.—*Birney v. New York, etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607.

Massachusetts.—*Redpath v. West. U. Tel. Co.*, 112 Mass. 71, 17 Am. Rep. 69; *Grinnell v. West. U. Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485.

Michigan.—*West. U. Tel. Co. v. Carrew*, 15 Mich. 525.

Minnesota.—*Cole v. West. U. Tel. Co.*, 33 Minn. 227.

Nebraska.—*Becker v. West. U. Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 356, 7 N. W. 868.

New York.—*Breese v. United States Tel. Co.*, 48 N. Y. 132, 8 Am. Rep. 526; *Young v. West. U. Tel. Co.*, 65 N. Y. 163, 34 N. Y. Sup. Ct. 390; *Kiley v. West. U. Tel. Co.*, 109 N. Y. 231; *Pear-sall v. West. U. Tel. Co.*, 44 Hun 532; *Schartz v. Atlantic, etc., Tel. Co.*, 18 Hun 159.

Pennsylvania.—*Wolf v. West. U. Tel. Co.*, 62 Pa. St. 83, 1 Am. Rep. 387; *Passmore v. West. U. Tel. Co.*, 78 Pa. St. 238.

South Carolina.—*Young v. West. U. Tel. Co.*, 65 S. Car. 93, 43 S. E. 448; *Pinekey v. West. U. Tel. Co.*, 19 S. C. 73, 45 Am. Rep. 765.

Tennessee.—*Marr v. West. U. Tel. Co.*, 85 Tenn. 530.

Texas.—*Womack v. West. U. Tel. Co.*, 58 Tex. 179, 44 Am. Rep. 614; *West. U. Tel. Co. v. Edsall*, 63 Tex. 668; *Anderson v. West. U. Tel. Co.*, 84 Tex. 17.

¹⁴⁶ *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Edsall*, 63 Tex. 668.

sense rule—and one the reason of which there is no necessity for argument—is, that no statement, agreement or any other kind of writing, should be signed until it shall have been read and understood. The rule applies to contracts and regulations of telegraph companies as it does to writings given out by any other corporation or individual. So, it has been held that it will be presumed the sender understood the contents of the blank and accepted the terms; and he is therefore estopped from denying or disputing the agreement.¹⁴⁷ Neither can he, in absence of misrepresentation or fraud, with full opportunity to be informed of its contents, avoid the contract upon the ground of his negligence or omission to read it, or to avail himself of such information.¹⁴⁸ Fraud will vitiate all contracts, and if there has been any misrepresentations or fraud perpetrated by the company on the sender, of course the contract will not be binding. It may seem to be a hard rule to impose such laws upon people who may be too ignorant to read the contents of these blanks, or who may not have had the time to read them. But, as it has often been said, these companies, like all other public institutions, have the right to pass and enforce all reasonable rules and regulations for the betterment of their business; and they may also limit to a certain extent some of their common-law liabilities by stipulations and contracts assented by their customers. These rules are certain, fixed and universal, and become part of the laws of their institution, and are, in a sense, promulgated to the public by notices on placards conspicuously tacked in their offices and elsewhere, and by notices given in their message blanks. This is the only means by which their regulations and contracts would likely come into the hands of those who should desire to employ them, and it is the duty of the latter—even though it may be some imposition on them—to accept the notice of these in this way; and it is presumed that they have been so accepted and agreed to when the sender has attached his signature to the blank.¹⁴⁹

¹⁴⁷ *Breese v. United States Tel. Co.* 48 N. Y. 132, 8 Am. Rep. 526; *Belger v. Densmore*, 51 N. Y. 166; *Womack v. West. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614.

¹⁴⁸ *Breese v. United States Tel. Co.*,

48 N. Y. 132, 8 Am. Rep. 526; *Soumet v. National*, etc., 66 Barb. 284; *Womack v. West. U. Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614.

¹⁴⁹ *Gray on Tel.*, p. 52.

§ 412. Contrary holding.

It is held in some jurisdictions that the mere fact that the sender affixes his signature does not of itself make the contract binding upon him, unless it is actually brought to his notice, and he signs with full knowledge of its terms.¹⁵⁰ In those states in which this is the holding, the question of knowledge and assent is a question of fact¹⁵¹ to be left to a jury upon evidence aliunde. As was said on the subject: "Whether he (the sender) had knowledge of its terms and assented to its restrictions, is for a jury to determine, as a question of evidence aliunde, and all the circumstances attending the giving of the blank are admissible in evidence to enable the jury to determine that fact,"¹⁵² and "slight evidence of acceptance of, or assent to, such regulations, would no doubt suffice, but it is for the jury to determine."¹⁵³ While this is the rule in some courts, yet the weight of authority, both court decisions and text-writers, is to the effect as stated heretofore. It will be seen, further, that some of these decisions were rendered in cases where the messages were written out by the sendee on paper other than on the blank forms furnished by the company, but were later attached to these forms by the operator.¹⁵⁴

§ 413. Special contracts—not applicable.

The rule first stated, we think, should not be applicable where the contract is special, or one which has been but recently adopted by the company, when its purpose is to exempt it from some of its common-law liabilities.¹⁵⁵ In these instances the sender should be spec-

¹⁵⁰ *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Illinois Central R. Co. v. Frankenburg*, 54 Ill. 88, 5 Am. Rep. 92; *West. U. Tel. Co. v. Stevenson*, 128 Pa. St. 442, 15 Am. St. Rep. 686, 18 Atl. 441, 5 L. R. A. 515.

¹⁵¹ *West. U. Tel. Co. v. Stevenson*, above cited.

¹⁵² *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38, approved by 61 Am. St. Rep. 209.

¹⁵³ *Id.*

¹⁵⁴ See note, 151.

¹⁵⁵ In *Webbe v. West. U. Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 210, the court, said: "Some of the cases seem to hold that the printed conditions upon blank forms of telegraphic dispatches, including the one in reference to the limit of sixty days, are mere regulations, and not contracts between the sender of the message and the telegraph company. The force of the distinction thus sought to be made lies in the fact that, if the conditions or stipulations are considered as mere reg-

ially referred to these contracts, in order that he may give special consideration to their terms before agreeing to them. It is a rule in the law of contracts that the contracting parties must be equally situated, in order to consider fairly the terms of the contract. In other words, neither should have any advantage over the other by the position held; and nothing should be given out or retained by either party, which would have the tendency to mislead the other. It would be unfair and illegal to attempt to force the terms of such a contract upon senders who had no knowledge of them, or who may not have had an opportunity to consider them fairly and uninfluenced. As was said in the preceding section, those rules therein were binding on the sender, although he fails or is unable to read them; but if he is unable to read special contracts on the account of his illiteracy, it is the duty of the company to inform him of their terms, or to give him special notice of them, in order that he may get others to read them for him. These contracts and stipulations contained in the message blanks are more especially beneficial to the company, and for this reason no advantage should be taken on account of its position, and no fraud, therefore, should be perpetrated on the public.

§ 414. Small type—not fraud.

It very often becomes necessary for these stipulations to be written in small type, otherwise, on account of the number and length of them the message blanks would be too large, cumbersome and inconvenient. Should, however, this matter be written so as to mislead the sender, but, on the other hand, the same is referred to by larger type, this will not be such an imposition or fraud as will affect the validity of the stipulation.¹⁵⁶ The general method by which the sender is referred to these stipulations, is by a notice written out on the front part and at the bottom of the message blank, and in the following words: "Read the notice and agreement on back." So, whenever

ulations, the assent of the sender to them is not necessary, but that he will be bound if they are brought home to his knowledge; whereas, if they are held to be parts of a contract, the as-

sent of the sender must be shown in order to bind him."

¹⁵⁶ Wolf v. West. U. Tel. Co., 62 Pa. St. 83, 1 Am. Rep. 387.

the sender fills out one of these message blanks, he is presumed to have observed this notice and complied with its request. At the top and on the front of these blanks may also be seen notices referring the sender to certain agreements which are to be accepted by him. Then, turning to the back of these blanks, there may be seen written at the top in large letters, a notice that all the stipulations thereunder enter into and become a part of the contract for sending. There is nothing about these blank forms which would have a tendency to mislead anyone, but nearly all of them contain notices which point almost directly to each and every stipulation, whether it be written in bold type or in other type not so large.

§ 415. Assent of addressee.

One of the most difficult subjects with which we have been so far confronted in this work is, Whether the assent of the addressee is necessary to make these stipulations binding on him? This subject has been very ably discussed both ways by the most eminent judges and textwriters, who have advanced reasons which appear unanswerable. We shall attempt to set out the ideas given each way, and then endeavor to harmonize these as far as it is possible. The answer to this question depends upon the ground upon which the court bases the right of recovery. Some of the courts consider that the receiver's right to recover rests entirely upon the contract made by the sender, upon the principle that where two parties contract for the benefit of a third, such third party may maintain an action for the breach of the agreement in his own right.¹⁵⁷ Whenever it is considered in this light, it necessarily follows that the receiver can assert no rights except such as are embodied in the contract made by the sender, and he is, therefore, bound by the conditions and stipulations appearing upon the blank upon which the message is sent, and to which the sender has assented.¹⁵⁸

¹⁵⁷ *Manier v. West, U. Tel. Co.*, 94 Tenn. 448.

¹⁵⁸ *West, U. Tel. Co. v. Waxelbaum*, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741n; *Stamey v. West, U. Tel. Co.*, 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; *West, U. Tel. Co. v. James*,

90 Ga. 254, 16 S. E. 83; *Sweetland v. Illinois, etc., Tel. Co.*, 27 Iowa 433, 1 Am. Rep. 285; *Russell v. West, U. Tel. Co.*, 57 Kan. 230, 45 Pac. 598; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *Massengale v. West, U. Tel. Co.*, 17 Mo. App. 257; *Curran v. West, U.*

§ 416. Same continued—illustrations.

In an action brought by the receiver of a telegram to recover damages for a failure to promptly deliver the message, according to these decisions the plaintiff would be governed by the contract as made by the sender in his behalf.¹⁵⁹ In one case it was held that both the addressee and the sender were bound by the stipulations in the message blanks.¹⁶⁰ So, it has been held that in order for the receiver to recover, he must have presented his claim in writing within the limitation.¹⁶¹ As was said: "The plaintiff had no cause of action independent of the contract made by the sender of the message. Having failed to present his claim within the time required by the contract, he has lost whatever right of action the contract gave him."¹⁶² It has been held, however, that if the blank form on which the message was written, when delivered to the company, contained no stipulations in regard to a certain time within which the claim should be presented, the addressee would not be bound by such stipulation, although this condition may have been in the message blank delivered to him.¹⁶³ It has also been held that, when one of these blanks contained a stipulation that the company would not be liable in damages beyond a certain amount for errors made in its transmission, unless the same was ordered to be repeated, the addressee was bound by this condition. In this case the message was delivered to the addressee on a blank containing the same condition, and it was shown that there was no further proof of negligence in the sending of the message other than that resulting simply from the error.¹⁶⁴ The opinions, in the

Tel. Co. 16 Misc. (N. Y.) 347; Aiken v. West. U. Tel. Co., 5 S. C. 358; Manie v. West. U. Tel. Co., 94 Tenn. 442; West. U. Tel. Co., v. Neill, 57 Tex. 283, 44 Am. Rep. 589; West. U. Tel. Co. v. Culberson, 79 Tex. 65; See note to Camp v. West. U. Tel. Co., 71 Am. Dec. 466; Berkett v. West. U. Tel. Co., 103 Mich. 361, 61 N. W. 645, 33 L. R. A. 404, 50 Am. St. Rep. 374; West. U. Tel. Co. v. Neel, 86 Tex. 368, 40 Am. St. Rep. 847.

¹⁵⁹ Id.

¹⁶⁰ Stamey v. West. U. Tel. Co., 92

Ga. 613, 44 Am. St. Rep. 95, 18 S. E. 1008.

¹⁶¹ Manie v. West. U. Tel. Co., 94 Tenn. 442; Russel v. West. U. Tel. Co., 57 Kan. 230, 45 Pac. 598.

¹⁶² Russel v. West. U. Tel. Co., 57 Kan. 230, 45 Pac. 598.

¹⁶³ West. U. Tel. Co. v. Hinkle, 30 Tex. Civ. App. 518.

¹⁶⁴ Ellis v. American Tel. Co., 13 Allen 226; West. U. Tel. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589; Sweetland v. Illinois, etc., Tel. Co., 27 Iowa 433, 1 Am. Rep. 285.

above cases, have been held differently in other jurisdictions, in which the courts say that the stipulation applies to the sender, and not to the addressee.¹⁶⁵ "The proposition," as was said, "that the defendants are liable, if at all, only in case the message is repeated, as contained in the printed conditions, can be invoked only as against the sender, if against any, for it is his message, his language, that is to be transmitted, and it is only known to the receiver when delivered. He is to be guided or informed by what is delivered to him, and he has no opportunity to agree upon any such condition before delivery."¹⁶⁶

§ 417. Same continued—actions in tort.

Some of the authorities maintain that the right of action which rests in the addressee of a telegram, to recover for the negligence of the company, does not arise out of the contract made between the sender and the company, nor out of the contract at all, but for a tort, that is, for a breach of public duty on the part of the company.¹⁶⁷ In England, the doctrine is that the receiver of a telegraphic message cannot sue the telegraph company on the ground that the obligation of the company springs entirely from the contract, and that the contract for the transmission of the message is with the sender of it.¹⁶⁸ This doctrine, however, has never prevailed in the United States, but here it is held by all courts, that the receiver of a message may maintain an action against the company for a breach of the latter's public duty, or an action on tort.¹⁶⁹ In those jurisdictions where the rule is that the receiver can only maintain his action on tort, it is universally held that the stipulations contained in the original blank or contract are not binding upon the addressee and do not affect his right of action.¹⁷⁰ Under this doctrine, the ad-

¹⁶⁵ *Tobin v. West. U. Tel. Co.*, 146 Pa. St. 375, 20 Atl. 324, 28 Am. St. Rep. 802; *New York, etc., Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338.

¹⁶⁶ *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383. See also *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38.

¹⁶⁷ *West. U. Tel. Co. v. Dubois*, 128

Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *West. U. Tel. Co. v. McKibbin*, 114 Ind. 511.

¹⁶⁸ *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 110, 21 N. E. 4.

¹⁶⁹ *Id.*

¹⁷⁰ See note 167.

dressee is not bound by the stipulation in these blanks, where it is required that the claim must be presented in writing within a specified time.¹⁷¹ Neither will the addressee's right of action be affected by a non-compliance with the stipulation, wherein it is required that, in order to avoid mistakes in the transmission, all messages should be ordered to be repeated; otherwise, the company will not be liable in damages beyond a certain amount.¹⁷² It has been said by these courts that, although these companies endeavor to incorporate the stipulations upon their blanks into the message as delivered, they are of no effect upon the receiver of the message, under this rule—considering him as not a party to the contract and whose only right is to sue in tort—for the reason, that he does not sign the message; and unless it can be shown that such stipulations were brought to his notice and assented to by him, he is not bound thereby.¹⁷³

§ 418. The correct view as considered.

Whenever the fruits and benefits of a contract made between the sender and the telegraph company flow directly and exclusively to the use of the receiver of the message, and the terms of the stipulations contained therein are not unreasonable with respect to the position in which he stands as receiver, he is bound by all the conditions of such contract just as the sender would be if the latter were receiving the benefits of such a contract. We do not mean to say, however, by this, that the receiver may not sometime sue the company in tort;

¹⁷¹ West. U. Tel. Co. v. McKibbin, 114 Ind. 511. Crosswell, in his work on the Law Relating to Electricity, Sec. 557, says: "In actions of tort by the addressee of a message, it is difficult to see how any limit of time, in which claims must be made against a telegraph company for damages occasioned by error or negligence in sending the message, can affect the plaintiff. In such cases, the plaintiff has no privity with the sender of the message, but sues solely for the breach of duty by the telegraph company, i. e., the failure of the telegraph company to per-

form its public duty of transmitting dispatches promptly and with due care, and has nothing to do with the special contract between the sender and the telegraph company, and, therefore, whatever stipulations the sender may make with the telegraph company should not bind the addressee."

¹⁷² West. U. Tel. Co. v. Fenton, 52 Ind. 1.

¹⁷³ West. U. Tel. Co. v. Lyeon, 60 Ill. App. 124; Webbe v. West. U. Tel. Co., 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670.

for there may be instances where the addressee should sue the company for a breach of its public duties. But as a general rule, he should sue for the breach of contract made by the sender and the company for his benefit. It follows, therefore, that the receiver is bound by the terms of the stipulations contained in the contract of sending, and it is presumed that the receiver, at the time the sender attaches his signature to the message, gives his assent to the stipulations therein and is bound from that time. It has been expressly held in one case, that the sender, under such circumstances, acts as agent for the receiver, and that the latter, as principal, is bound by all the acts of his agent which fall within the scope of his express or apparent authority.¹⁷⁴ In order, however, to bind the receiver by all the conditions of the contract, made by the sender in his behalf, they must be reasonable to him as receiver. As will be clearly seen, the terms of the stipulations contained in these blanks may be reasonable and therefore binding, if considered to have been made by the sender in his own behalf; but they would not be, if viewed in the light that they were entered into by him for the exclusive benefit of the addressee. If, however, the addressee knows of the contract about to be made, or has notice that the message has been sent, the reasonableness of the stipulations would be the same, both to the addressee and the sender; but this is not always the case, and, of course, this fact must be considered in determining the reasonableness and binding effect of them upon the addressee. For instance, if a message which contains business matter for the exclusive benefit of the addressee was delivered to the company without the former's knowledge, but was never sent, whereby he suffers great injury, he will not be precluded from recovering such loss, although the claim, as required in the contract for sending, was not presented to the company within the limitations. If he should have had notice of such message having been sent before the expiration of the limitation, a claim should have been presented if there remained a reasonable time to have done so by reasonable diligence on his part.¹⁷⁵ The same reasons would be applicable if the message had been sent but

¹⁷⁴ *Coit v. West, U. Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 53 L. R. A. 678.

¹⁷⁵ *West. U. Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608.

never delivered.¹⁷⁶ Therefore, it will be seen that these rules may be reasonable with respect to the sender, but at the same time may not with respect to the addressee. It may be said, however, that if the addressee has received notice by letter or otherwise from the sender that the contract of sending the message had been made, and that this knowledge had been ascertained within a sufficient time to have given him a reasonable opportunity to have complied with the terms of the stipulations, he will be bound by them.

§ 419. Assent—proof of—what amounts to.

The opportunity of the addressee to know and be familiar with the regulations of the company are primary facts and do not create any conclusive presumption of knowledge, no matter what the opportunity was.¹⁷⁷ In a case on this subject, the company showed that for a long time it had required messages to be written on a blank containing these stipulations. The plaintiff admitted that he was familiar with the appearance of the blanks, had frequently used them for writing messages, and that a parcel of them was always on his office desk, but averred that he had never read the stipulation and had no knowledge of its terms. It was held that, in the absence of evidence that the terms of the stipulation were brought home to him, it was proper to exclude the blanks from the consideration of the jury.¹⁷⁸ It will be seen, in reading this case, that the message was written out on a blank piece of paper, and in this manner delivered to the company. Of course, if the message had been written on one of the message blanks containing these stipulations, the plaintiff, as said at another place, would be bound by all the conditions therein, although he failed to read them or even had an opportunity to do so. We think that a correct and proper conclusion was arrived at in the above case, and that it is not repugnant to the decision in the case where the message was written on a mutilated blank of the com-

¹⁷⁶ *Sherrill v. West. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Herron v. West. U. Tel. Co.*, 90 Iowa 129, 57 N. W. 696.

¹⁷⁷ *Webbe v. West. U. Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep.

207; *Merchants' Dispatch, etc., Co. v. Moore*, 88 Ill. 136, 30 Am. Rep. 541; *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662.

¹⁷⁸ *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662.

pany.¹⁷⁹ In this latter case, the opportunity of the plaintiff to know the conditions contained in the message blanks were about the same as that of the plaintiff in the above case. But in the first place, there was some doubt as to whether the message blank was mutilated at the time the message was written thereon, but even though it may have been mutilated at this time, we think the court had a correct view of the case in holding that the plaintiff's opportunity was sufficient to give him knowledge of the terms of the stipulation. Part, if not all, of the stipulations were on this message blank, and if part of these were torn off or mutilated, this fact would not of itself destroy the effect of the stipulation; for that part which remained on the blank, would be, if necessary, sufficient to put him on inquiry. We do not think that either of these cases would be affected by the fact that the plaintiff was a stockholder of the company, for it is not presumed that stockholders have any better knowledge of the regulations adopted by the directors of the company than any other person.¹⁸⁰

§ 420. Stipulation posted in company's office—not binding.

Occasionally telegraph companies may see fit to post some of their regulations in conspicuous places in their offices. It has been held that, when this has been done, these regulations enter into and become a part of the contract for sending.¹⁸¹ But it is almost universally held that they do not any more become binding on the sender than other stipulations about which he is absolutely ignorant.¹⁸² There is no doubt but that the latter holding is the correct view of the subject, aside from the fact that it is not a contract assented to. It would be very unwise to give these companies the power to bind anyone in their business with such regulations, because it would have the tendency to give them room to perpetrate fraud or imposition upon their patrons.

¹⁷⁹ *Kiley v. West. U. Tel. Co.*, 109 N. Y. 231.

¹⁸⁰ *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662.

¹⁸¹ *Birney v. New York, etc., Printing*

Tel. Co., 18 Md. 341, 81 Am. Dec. 607.

¹⁸² *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280.

§ 421. Messages written on blanks of another company—binding.

It has been held that if the message has been written, through mistake, on the blanks of another company, whose terms therein are substantially the same as those of the first company, the plaintiff will be bound by such stipulations.¹⁸³ It may be said that the contract for sending was not made with the first company, since its name was not on the message blank, but this cannot be asserted with any effective defense. A sound principle of the law of contracts is, that if the agent, through mistake of any kind, writes his principals name incorrectly, or even uses that of another, but it is intended by him to write his principal's name; or, if the contract is made for him and the same is known by the other party, but another's name is inserted instead of his, the contract will be binding, although it shows on its face that it was made between the other parties. In such cases, where the contracting parties are in dispute as to the real parties, parol evidence may be admitted to show this fact. The same rule is applicable here. So, when the message blank of another company should, by mistake, be mingled with those of the contracting company; or, if this blank is used for the message sent, but the contract is with the company in whose possession they have become carelessly thrown, the stipulations and conditions contained therein, which are substantially the same as those on its own blanks, will be binding on the patron. It has not been decided, to our knowledge, as to whether any stipulation, other than such as are substantially the same as those contained in the company's own forms, would be binding on the sender, but we think that only such as are substantially the same would be binding; nor do we think that stipulations contained in these forms, used by mistake and not in those of the contracting company, would be binding. All the regulations of these companies must be adopted by its proper officers, at legally-called meetings for that purpose. Stipulations in other companies' forms, differing substantially from those of the contracting company, or which are not

¹⁸³ West. U. Tel. Co. v. Waxelbaum, 113 Ga. 1017, 56 L. R. A. 741n, 39 S. E. 443; United States Tel. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec.

519; Clement v. West. U. Tel. Co., 137 Mass. 463; Young v. West. U. Tel. Co., 65 S. C. 93, 43 S. E. 448.

contained therein at all, have not been adopted in any manner by this company, and cannot, therefore, be enforced by or against it.

§ 422. Same continued—knowledge of company's stipulations.

It must be remembered, however, that where other companies' forms are used, the sender must have had knowledge of the terms of the conditions contained in those of the company, before they become binding on him;¹⁸⁴ for, almost the same rule, in regard to messages being on blank paper, is applicable in these cases. If the conditions on these blanks were identically the same in every respect, we think this would not be the case; but if they are similar in nature, the compliance of each only being different, the knowledge which the sender may have of those contained in one could not be asserted against him in the use of the other. For instance, the stipulation in regard to the time within which claims must be presented to the company may, and generally does, vary in the different forms, as to the length of the limitation. Some of these stipulations require the claims to be presented within ninety days after the message shall have been filed for transmission, and others limit the time to sixty and some to thirty and others to twenty days. So it will be seen that the nature of these conditions is similar, yet the compliance of each is different; and a knowledge of the condition of the terms of a stipulation, in this respect, could not be ascertained from the stipulation contained in a blank form not used by the company. The sender would not, however, be placed in the same position if he should write the message on a blank piece of paper. In using the forms of another company he would be referred (and it is presumed that he followed out this reference) to sufficient evidence on the face of the message blank which would put him on inquiry to ascertain the true facts of the condition of terms in the company's blank; but of this evidence he is deprived when merely using the blank paper. We think that this rule should be more particularly applied to cases where it is known by the sender that the blanks are those of another company; and yet this is not absolutely necessary to make it applicable.

¹⁸⁴ *Pearsall v. West, U. Tel. Co.*, 124 442, 5 E. R. A. 515, 15 Am. St. Rep. N. Y. 256, 21 Am. St. Rep. 662; *West*, 687; *West, U. Tel. Co. v. Hinkle*, 3 U. Tel. Co. v. Stevenson, 120 Pa. St. Tex. Civ. App. 518.

It is generally the rule of these companies that its own blanks shall be used by parties employing their services, and that the operators shall not accept any message written on other than their own blanks: this will be the case although the sender was ignorant of such a rule.¹⁸⁵

§ 423. Messages delivered to company by telephone or verbally.

As has been said, the sender must have had actual notice of the terms of the stipulations of the company, in order for them to be binding on him, and it is presumed that he had this notice when he attached his signature to the message blanks. It is only when these forms are not used that this question is generally litigated. For instance, this question has come up where the message was accepted by the company by telephone, or when orally given to its operator. It has been held in these cases that if the sender has actual knowledge of the terms of these stipulations, at the time the message was so given to the company, he will be bound by them; and that this knowledge is a question of fact to be determined by the jury from the evidence adduced on this point.¹⁸⁶ It was attempted to be shown in some of these cases that the company's operator, when receiving the message over a telephone, was acting as agent, in that particular matter, for the sender, and that the operator's knowledge of the terms of these conditions was knowledge of the sender; but this was held not to be the case.¹⁸⁷ The question has also come up in such cases as to whether it was the object of the company to relieve the sender of these stipulations; but it was also held that this was a question of fact to be left to a jury.¹⁸⁸

§ 424. Principal bound by the knowledge of the agent.

It is a general law of agency that the principal is bound by all the acts of his agent which fall either within the scope of his express authority or that of his apparent authority; and any knowledge of

¹⁸⁵ *Beasley v. West. U. Tel. Co.*, 39 Fed. 181; *West. U. Tel. Co. v. Arwine*, 5 Tex. Civ. App. 156, 22 S. W. 105.

¹⁸⁶ *Carland v. West. U. Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394, 43 L.

R. A. 280, 76 N. W. 762.

¹⁸⁷ *Id.*

¹⁸⁸ *West. U. Tel. Co. v. Stevenson*, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515.

facts pertaining to such acts coming to the agent while exercising this authority, is presumed to have been known by the principal, and he is therefore bound by such knowledge. It therefore follows that, if the sender of a message is acting for the receiver, as his agent and he has knowledge of the terms or conditions contained in the message blanks, the receiver is bound by all these stipulations, although he, himself, was ignorant of them.¹⁸⁹ There is an exception to this rule, however, as said elsewhere, brought about by the position in which the receiver may stand. For instance, the sender may be acting as the receiver's agent in this particular matter, without the latter having any knowledge of this fact, and the message may be delivered to the company but never transmitted; or, the company may fail to deliver it after it has been transmitted. Unless the receiver knew these facts he would not be bound by these stipulations. If the agent acts on any occasion, in the capacity of such, although it is for that particular matter, and he knows of the terms of these stipulations, the principal will be bound by them. So, where the operator fills out one of these blanks at the request of the sender, the latter, upon attaching his signature thereto, is bound by the stipulations, notwithstanding his failure to notice them;¹⁹⁰ or, if the message is written out by the sender on a blank piece of paper, and given in this manner to the operator who transcribes it on these forms and reads the stipulation therein to the sender without his objecting to them, he will be bound by them.¹⁹¹ The operator acts in these cases in the capacity of agent for the sender. It is otherwise, however, if the sender does not see and does not sign or otherwise agree to these conditions.¹⁹² And if the message is written on blank paper by the sender and delivered in this style to the operator, who attaches it to one of these message blanks without the authority of the sender, the latter will not be

¹⁸⁹ *Clement v. West. U. Tel. Co.*, 137 Mass. 463; *Coit v. West. U. Tel. Co.*, 130 Cal. 657, 80 Am. St. Rep. 153, 53 L. R. A. 678, 63 Pac. 83.

¹⁹⁰ *West. U. Tel. Co. v. Edsall*, 63 Tex. 668; *Gulf, etc., R. Co. v. Geer*, 5 Tex. Civ. App. 349, 24 S. W. 86; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419.

¹⁹¹ *West. U. Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638.

¹⁹² *West. U. Tel. Co. v. Uvalde National Bank*, 72 S. W. (Tex.) 232; *Beasley v. West. U. Tel. Co.*, 39 Fed. 181; *West. U. Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 826.

bound by these stipulations, if he had no knowledge of them;¹⁹³ and it is his duty, when the company attempts to bind him by their terms, to plead and prove *non est factum*.¹⁹⁴ It should be borne in mind that if the plaintiff ascertains a knowledge of the terms of the stipulations or regulations of the company, as they appear on the message blanks furnished by them through his agent or otherwise, and he assents to them, he will be bound; but this knowledge must be brought to the mind of the plaintiff or his agent, while acting as such to the knowledge of the former.

¹⁹³ Harris v. West. U. Tel. Co., 121 Ala. 519, 25 So. 910, 77 Am. St. Rep. 70; West. U. Tel. Co. v. Shumate, 2 Tex. Civ. App. 429, 21 S. W. 109; West. U. Tel. Co. v. Pruett, 75 S. W. (Tex.) 78; Anderson v. West. U. Tel. Co., 84 Tex. 17, 19 S. W. 285.

¹⁹⁴ West. U. Tel. Co. v. Hayes, 63 S. W. (Tex.) 171.

CHAPTER XVIII.

LIABILITY OF COMPANIES IN PARTICULAR CLASSES OF CASES—CONTRACT TO FURNISH MARKET REPORTS AND OTHER NEWS.

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§ 425. In general.

The duty of telegraph companies, with respect to the nature of intelligence to be sent, is to transmit promptly and correctly only such intelligence as is general, and that which they are employed to transmit; it is not their duty to *collect* and transmit news, unless a special contract is made to that effect. These companies may, however, enter into a special contract, for a consideration greater in amount than that charged for their general services, to insure the correctness of the message.¹ These contracts may be of two kinds, and in determining the liability of the company this fact should be considered, since they may be liable under one and not under the other. For instance, the company may contract to insure a safe transmission of messages as delivered to it; or, it may insure the correctness of the intelligence sent. In other words, these companies may contract to insure the correctness in the transmission of a message, and assume all hazards with which it may come in contact, which gives them the qualities of a common carrier; or, they may assume, under a special contract, even a greater responsibility than that of merely insuring a correct transmission, by contracting to transmit the correctness of the intelligence. Under the latter contract, they must not only transmit accurately and correctly, but the other contracting party is guaranteed

¹ *Goodsell v. West. U. Tel. Co.*, 130 N. Y. 430; *West. U. Tel. Co. v. Stevenson*, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515. In the first case, it appeared that a telegraph company contracted to deliver certain news reports of an average number of words per day, one-third to be transmitted in the day time and two-thirds at night, to all the places named in a certain schedule, for a gross sum per month, the other party to have the right to substitute other

places for those named; and, if the reports were transmitted to "any greater number of places" than were enumerated in such schedule, then an additional payment should be made. The schedule contained 38 different places. It was held that the company was bound, without additional payment, to transmit the day reports to 38 places and the night reports to 38 places, although the latter places were different from the former.

or insured that the intelligence was correctly *collected* or *received* by the company, before its transmission;² and, it is the latter kind we next discuss.

§ 426. Market reports, etc.

Contracts whereby telegraph companies agree to insure the correctness of the intelligence sent are generally such as are made to furnish market reports, stock quotations and other like news. In such contracts as these, it becomes the duty of these companies *to collect* the news and then to transmit it to the other party; and an error made in either part of this transaction, whereby the other party suffers, will render the company liable for damages. These contracts are extraordinary in their nature, and become much greater in their performance than those ordinarily made in the general course of these companies' public duties. It follows, of course, that the consideration given in return for the extra hazard assumed should be much greater and it seems that the contracts should be more strictly construed than those made in the ordinary manner. The position has been taken in some of the cases arising out of these contracts, that these companies should not be liable where the message was incorrectly given to them, and which was no fault on their part; but it is generally held that they become as liable for an error made in one part of the transaction as that made in the other; in fact, the receiving or collection of the news is the more responsible part of their undertaking. So, they should be held for errors made in the collection of the news independent of the question as to how the error was made.³

§ 427. Same continued—organized for collecting news.

In some instances, telegraph companies are organized for the express purpose of collecting news, but when this is the case they are

² Gray on Tel. 31.

³ Gray on Tel. 31; *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458, 20 Am. Rep. 605; *Bank of New Orleans v. West. U. Tel. Co.*, 27 La. Ann. 49. In this last case the company's defense was that the error in the reports was caused by the working of the gold stock

indicator in their office in New York from which they received their information. It was held that this did not release them from liability, since they had contracted to deliver to plaintiff's correct information which they should have obtained, without relying wholly on the indicator.

possessed of the same general powers, and subject to the same obligations, as ordinary telegraph companies. Thus, they may adopt and enforce reasonable rules and regulations with respect to the use of their instruments, and provide that the messages shall not be given out to non-subscribers. It is generally provided in these contracts made with subscribers, that "these reports are furnished to subscribers for their own private use in their own business exclusively. It is stipulated that subscribers will not sell or give up copies of the reports in whole or in part, nor permit any outside party to copy them for use or publication. Under this rule, subscriptions by one party for the benefit of himself and others at their joint expense will not be received."⁴ It has been held that these stipulations were reasonable and did not conflict with any duty the company owed to the public. And it has been further held that if the subscriber should furnish such report to another firm of which he was a member, the company would be justified in removing its machine from his office.⁵ These companies are exercising a public function and must therefore perform such duties as are imposed upon other corporations of a public character. They cannot, therefore, discriminate between their subscribers, but are under obligation to discharge their duties to one the same as to an other, and may be enjoined from refusing to continue serving a subscriber who has complied with all their reasonable regulations.⁶ They are not, however, under any obligation to furnish these reports to a gambling place, although they may have contracted to do so, as they can be under no obligation to further an illegal undertaking.⁷

⁴ *Shepard v. Gold., etc., Tel. Co.*, 38 Hun (N. Y.) 338.

⁵ *Id.*

⁶ *Friedman v. Gold., etc., Tel. Co.*, 32 Hun (N. Y.) 4; *Smith v. Gold., etc., Tel. Co.*, 42 Hun (N. Y.) 454; *Metropolitan, etc., Ex. v. Mut. U. Tel. Co.*, 11 Biss. (U. S.) 531; *Bradley v. West. U. Tel. Co.*, 27 Alb. L. J. 363.

⁷ In *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483, the court, said: "These reports were the essence, the very sinew, of appellant's gambling

business, and without the prompt supply of which, his business was a failure. Can the appellee be compelled to to continue the supply? We think not. Not upon the ground that the appellee is the innocent victim of an illegal enterprise; not that it has been entrapped into aiding a gambling business, for it says that it was willing to furnish the reports as long as the terms of the contract suited it; but upon the ground that appellant was engaged in a gambling enterprise.

§ 428. Gambling transactions—messages in regard to.

While a telegraph company may not refuse to transmit or deliver messages relating to "futures" or similar gambling transactions, or escape a statutory penalty for failing to transmit such messages yet the amount of damages to be recovered for an error made in the transmission of such are only nominal and cannot exceed the amount paid for their transmission. There is a distinction between real gambling, and dealing in what is commonly called "futures;" and this distinc-

which is contrary to law, good morals, and public policy. It is for the sake of the law and the best interests of society that we relieve the appellee from continuing to furnish to appellant the reports. The appellant is engaged in running a "bucket shop."

* In *Kirkpatrick v. Bonsall*, 72 Pa. St. 155, the court, said: "We must not confound gambling, whether it be in corporate stocks, or merchandise, with what is commonly termed speculation. Merchants speculate on the future prices of that in which they deal, and buy and sell accordingly. In other words, they think of and weigh—that is, speculate upon—the probabilities of the coming market, and act upon this lookout into the future in their business transactions; in this they often exhibit high mental grasp and great knowledge of business, and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions and buy and sell in a *bona fide* way. Such speculation cannot be denounced. But when ventures are made upon the terms of prices alone, if no *bona fide* intent to deal in the article, but merely to risk the difference between the rise and fall of its price; no money or capital is invested, in the purchase, but so much only is required as will cover the difference—a margin, as it is figuratively termed—then the bargain represents,

not a transfer property, but a mere stake or wager upon its future price. The difference requires the ownership of only a few hundred thousands of dollars, while the capital to complete an actual purchase or sale may be hundreds of thousands or millions. Hence, ventures upon prices invite men of small means to enter into transactions far beyond their capital, which they do not intend to fulfill, and thus the apparent business in the particular trade is inflated and unreal, and, like a bubble, needs only to be pricked to disappear often carrying down the *boni fida* dealing in its collapse. Worse even than this, it tempts men of large capital to make bargains of stupendous proportions and then to manipulate the market to produce the desired price. This, in the language of gambling speculation, is making a corner; that is to say, the article is so engrossed or manipulated as to make it scarce or plenty in the market at the will of the gamblers, and then to place its price within their power. Such transactions are destructive of good morals and fair dealings, and of the best interest of the community. If the articles be stock, corporations are crushed and innocent stockholders ruined to enable the gambler in its price to accomplish his end. If it be merchandise, e. g., grain, the poor are robbed and misery engendered."

tion gives those dealing in the latter a right similar to that enjoyed in the transmission of ordinary messages. It is presumed in the "future" contracts, that there is to be a delivery of the goods;⁹ but in gambling, there is a wager outright for a loss or a gain.¹⁰ These companies are under no obligations to accept messages for transmission which are purely gambling messages, for, to do so, would be contrary to law, good morals, and public policy. But it seems that there is no laudable reason why they should refuse to transmit messages relating to "futures," where that class of business has not been prohibited by statute, although it may be a species of gambling. While they are not gambling contracts, yet they are very speculative and uncertain and for this reason the failure to correctly and promptly transmit them only lays the company liable for nominal damages.¹¹ We shall discuss later the rights of a party to recover, as a part of his damages, future profits; but suffice it to say here, that only such damages can be recovered for the breach of a contract as was contemplated by the parties at the time of making the contract, or such as would flow directly and proximately from such breach. It is universally held that the profits to be made in "future" contracts do not fall within this rule, and are not, therefore, recoverable for losses occurring in the failure to transmit or deliver correctly, such messages.¹² Furthermore, the "future" contract may be illegal and void with respect to the parties making it, and thereby unenforceable by either of them. So, neither could, therefore, invoke it as a basis for the recovery of

⁹ Fortenbury v. State, 47 Ark. 188; 1 S. W. 58; Pexley v. Baynton, 79 Ill. 351; Tomblin v. Calen, 69 Iowa 229; 28 N. W. 573; Conner v. Robinson, 37 La. Ann. 814, 55 Am. Rep. 521; Clay v. Allen, 63 Mo. 426; Kingsbury v. Kerwan, 77 N. Y. 602; Irwin v. Williar, 110 U. S. 499; Smith v. Bouvier, 70 Pa. St. 325; Appleman v. Fisher, 34 Md. 540.

¹⁰ Fortenbury v. State, 47 Ark. 188, 1 S. W. 58; Whiteside v. Hunt, 97 Ind. 191, 49 Am. Rep. 411; Clay v. Allen, 63 Miss. 426.

¹¹ Bryant v. West. U. Tel. Co., 17

Fed. 825; Cohn v. West. U. Tel. Co., 46 Fed. 40, affirming (C. C. A.) 48 Fed. 810; Smith v. West. U. Tel. Co., 84 Ky. 664, 2 S. W. 483; Morris v. West. U. Tel. Co., 94 Me. 423, 47 Atl. 926; West. U. Tel. Co. v. Harper, 15 Tex. Civ. App. 37; West. U. Tel. Co. v. Hall, 124 U. S. 444; West. U. Tel. Co. v. Littlejohn, 72 Miss. 1025, 18 So. 418.

¹² Cothran v. West. U. Tel. Co., 83 Ga. 25, 9 S. E. 836, overruling West. U. Tel. Co. v. Blanchard, 83 Ga. 25, in this respect. See also Melchert v. American U. Tel. Co., 11 Fed. 194.

substantial damages.¹³ It seems, however, that where the action against the company is to recover the statutory penalty, the company cannot defend on the ground that the message, which it was negligent in transmitting, related to a gambling transaction.¹⁴

§ 429. Indecent language not bound to accept.

Telegraph companies are not under obligation to accept any message for transmission which would subject them to an indictment or to a civil action, and any message which is indecent, obscene or filthy on its face, may be rejected by them. But in order for the company to take advantage of this right, the contents of the message should be couched in such indecent language as to show on its face this fact; because, if it is ambiguous, or if there is doubt of its indecency, the sender should have the benefit of the doubt. The reason of this is, that where a dispatch is ambiguous, the law gives the benefit of the ambiguity to the company dealing with it, when sued either civilly or criminally for transmitting the message; and it would therefore be the duty of the company, in deciding whether to transmit, to give the benefit of the doubt to the sender.¹⁵ Thus, in the message, "send me four girls on first train to Francesville, to attend fair,"¹⁶ it was attempted to be shown that the company was not lia-

¹³ *Melchert v. Am. U. Tel. Co.*, 11 Fed. 194; *Cothran v. West. U. Tel. Co.*, 83 Ga. 25, 9 S. E. 836. The burden of proof is on the company to show that the message related to a "future" contract: *West. U. Tel. Co. v. Hill*, 65 S. W. (Tex.) 1123; *Hoeker v. West. U. Tel. Co.*, 34 So. (Fla.) 901.

¹⁴ Under the Georgia statute which requires that telegraph companies should receive all dispatches either from other lines or from individuals, and "shall transmit the same with impartiality and good faith, and with due diligence under penalty of," etc., the court holds that a telegraph company is denied any power of selection or discrimination. "A dispatch cannot be rejected on account of its sub-

ject matter, unless by sending it, the company would or might subject itself or its servants either to indictment or civil action. This is a rational test and one that may fairly be presumed to coincide with legislative intention. Now, in this state, it is neither a crime nor a tort to speculate in futures. It is a gross immorality, and conflicts with the public policy; but it is not indictable nor actionable." *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 27 Am. St. Rep. 259, 14 L. R. A. 95; *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495.

¹⁵ *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 27 Am. St. Rep. 259, 14 L. R. A. 95, 13 S. E. 562.

¹⁶ *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495.

ble for a failure to transmit this message, on the ground that its object was indecent, in that its purpose was to have prostitutes attend the fair; but the court held that the language of the message was ambiguous and that the plaintiff should have had the benefit of the ambiguity.¹⁷ The amount of damages to be recovered for an error made in the transmission of such messages is the same as that to be recovered in a similar error made in a message relating to "futures."¹⁸ and is founded on the ground that the message is for an unlawful purpose, or an attempt to accomplish something in an illegal manner.

§ 430. Liable civilly or criminally—indecent language.

It is not the object of the law to impose upon these companies the duty to transmit any message which would subject them to a civil or criminal action, and any message whose object is to accomplish such, may be rejected by the company.¹⁹ But it is not every message whose object is illegal which will subject the company to a liability; and, if there is any doubt of its illegal purpose, the doubt must be construed in favor of the company.²⁰ Thus, it has been held that these companies will not be held indictable, as being guilty of maintaining a common nuisance, for transmitting information concerning horse races to a pool room, although it appears that the place is resorted to by idle and evil-disposed persons, for selling pools and betting on races, to the common annoyance of all good citizens of the neighborhood.²¹

¹⁷ See notes 15 and 16 for cases.

¹⁸ See § 428.

¹⁹ *West. U. Tel. Co. v. Ferguson*, 57 Ind. 495. In *Pugh v. City, etc., Tel. Co.*, 27 Alb. L. J. 163, it was held that a telephone company may provide that no indecent or profane language shall be used over its line and may refuse to serve a subscriber who uses such language in speaking through its line. In this case the subscriber, being annoyed because unable to get the number he wished call up, said: "If you don't get that party I want, you can shut up your damned old telephone." Keeping a bawdy-house was an indict-

able offense at common law, and one who leases a house with the knowledge that it will be used for that purpose is subject to an indictment: 9 Am. & Eng. Ency. of Law, 2 Ed. 527. A telephone company could refuse to furnish such a house with telephonic facilities: *Godwin v. Tel. Co.*, 136 N. Car. 258, 48 S. E. 636, 103 Am. St. Rep. 741, 67 L. R. A. 251.

²⁰ *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 27 Am. St. Rep. 259, 14 L. R. A. 95, 13 S. E. 562.

²¹ *Com. v. West. U. Tel. Co.*, 67 S. W. 59, 57 L. R. A. 614.

§ 431. Libel—liable for.

Any means whereby a writing, which is libelous per se, is communicated to the party injured, is a publication of the libel.²² So, if a message, which is libelous per se, or if it clearly shows on its face, statements which would be understood by a man of ordinary intelligence as being a sufficient ground to lay the writer or sender liable for an action of libel, and the company transmits such a message, it will be guilty of a publication of the libel and will be just as liable for damages arising out of it as the writer of the message would be. Thus, where a company accepted and transmitted a message directed to the plaintiff, reading: "Slippery Sam, your name is pants," and signed, "Many Republicans," it was held that the message sufficiently indicated to the company its libelous character, and that plaintiff was entitled to recover damages for the libel.²³ And it was held that the company was guilty of publishing a libel by transmitting a message stating that "the citizens of Wisconsin demonstrated you are an unscrupulous liar," and was liable for all damages arising out of such publication.²⁴ It is generally held that the libelous matter directed to the party defamed, without having been seen or heard by any other person, will not support a civil action,²⁵ but this rule cannot

²² Alabama, etc., R. Co. v. Brooks, 69 Miss. 168, 13 So. 847, 30 Am. St. Rep. 528; Adams v. Lawson, 17 Gratt 250, 94 Am. Dec. 455; Miller v. Butler, 6 Cush. 71, 52 Am. Dec. 768; Fogg v. Boston, etc., R. Co., 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583; Evening Journal Assn. v. McDermott, 44 N. J. L. 430, 43 Am. Rep. 392; Johnson v. St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293; Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672. The publication of a libelous letter is complete when it is received and read: McCarlie v. Atkinson, 77 Miss. 594, 27 So. 641, 78 Am. St. Rep. 540. The dictation of a libelous letter to a confidential shorthand writer and the copying of it by him on a typewriting machine, after which it is signed by the person dic-

tating it, is a publication of its contents, so as to entitle the person to whom it is addressed to maintain either libel or slander upon it, although there is no communication of its contents to any other person: Gambrill v. Schooley, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 420, 52 L. R. A. 87; Monson v. Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

²³ Peterson v. West. U. Tel. Co., 65 Minn. 18, 33 L. R. A. 302, 72 Minn. 41, 40 L. R. A. 661, 71 Am. St. Rep. 461, 75 Minn. 368, 74 Am. St. Rep. 502, 43 L. R. A. 581.

²⁴ Monson v. Lathrop, 96 Wis. 386, 65 Am. St. Rep. 54, 71 N. W. 96.

²⁵ Spails v. Poundstone, 87 Ind. 522, 44 Am. Rep. 773; Wilcox v. Moon, 64 Vt. 450, 33 Am. St. Rep. 936, 24 Atl. 244, 15 L. R. A. 760.

apply here, for, if a message is sent to the party defamed by telegraph the contents of the telegram are necessarily communicated to all the clerks through whose hands it passes.²⁶ If, however, the message is couched in such language as an ordinary person, ignorant of the circumstances and knowing nothing of the parties, would not suppose it to be defamatory, the company would not be liable,²⁷ unless it had been informed of the character of the message. Under such circumstances, the message may be libelous, and one for which the sender would be liable, yet if the company has no information of its character, or has no means by which it may ascertain this fact, it will not be liable.²⁸

§ 432. Interstate messages.

A great many cases have grown out of suits brought to recover damages for errors made in the transmission of messages which are sent from one state into another.²⁹ A question which has presented itself in such cases is, Whether an action can be maintained for a breach of the company's common-law duty to use proper care to secure a correct and prompt transmission and delivery, where the message falls within the cases of interstate messages? This question has been answered by an almost unanimity of decisions in the affirmative. It has been held that the sender may recover damages for such breach, although it happened in the state other than that from which the message was sent.³⁰ The receiver of the message may, as held, maintain the suit also, with respect to a civil action, and it does not matter where the breach occurred.³¹ The contract for sending the

²⁶ *Peterson v. West. U. Tel. Co.*, cited in note 23.

²⁷ *Nye v. West. U. Tel. Co.*, 104 Fed. 628; *Stockhan v. West. U. Tel. Co.*, 10 Kan. App. 580, 63 Pac. 658.

²⁸ *Weir v. Hoss*, 6 Ala. 881; *Mayne v. Fletcher*, 9 Barn. & Co., 382; *Park v. Detroit Free Press Co.*, 72 Mich. 560, 1 L. R. A. 599, 16 Am. St. Rep. 544.

²⁹ *West. U. Tel. Co. v. Reynolds*, 77 Vt. 173, 46 Am. Rep. 715; *Dougherty v. Am. U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *West. U. Tel. Co. v.*

Richmond, 8 Atl. (Pa.) 171; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126. See also *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 26 Am. St. Rep. 363, 44 N. W. 1064.

³⁰ *Id.*

³¹ *Young v. West. U. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669n; *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864. Compare *Carnahan v. West. U. Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175.

message was made in the state from which it was sent, and there the action should be maintained irrespective of the place or places where the breach occurred. "It is wholly immaterial," as was said, "where the act or omission occurred, whether at the office where it was received, at some intermediate point, or at the office to which it was sent. The contract cannot in such case be said to have been violated at one place any more than at another. It is violated everywhere because it is performed nowhere."³² This rule would only apply where the action was to recover damages for a breach of its public duties, or on an action of tort. And it seems that the fact that a statute exists which is declaratory of the common-law duty, and which further provides that the company shall not contract to limit its liability for the consequences of its negligence, does not create a different case or necessitate a different rule of law.³³

§ 433. Recover of statutory penalty—not applicable.

The above rule is different when the action is to recover a statutory penalty imposed on these companies for a violation of their duties. It is a general law that penal statutes cannot be enforced beyond the state creating them, and this rule is applicable in the present instance.³⁴ While they are enforceable against these companies when the violation of the statute occurs within its limits, notwithstanding the fact that the message falls under the class of interstate messages,³⁵ yet they cannot be effective beyond the state boundaries. One of the reasons for holding to such a rule is, that to enforce such would necessarily involve these companies in endless difficulty, in that they would be punished in different ways for the same wrong. As was

³² *West. U. Tel. Co. v. Hamilton*, 50 Ind. 181. This case is overruled by the Supreme Court of the United States in *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347.

³³ *Kemp v. West. U. Tel. Co.*, 28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363.

³⁴ *Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 5 So. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71; *West. U. Tel. Co. v. Pendleton*, 122 U. S. 347.

³⁵ Thus where the company fails to deliver a telegram, the penalty may be recovered, although the message was sent from a point without the state: *West. U. Tel. Co. v. James*, 90 Ga. 254. So, Where there is a refusal or failure to transmit, the sender may enforce the penalty, although the point of destination of the message is in another state: *Connell v. West. U. Tel. Co.*, 108 Mo. 459, 18 S. W. 883.

ably said: "Unless we adopt the view that the statute only applies to contracts made in this state, we shall be involved in endless difficulty. Any other rule would make the telegraph company amenable to different punishments for the same wrong, for it is quite clear that if the wrong is punishable by the laws of the place where the contract is made, it would be no answer to a prosecution there to plead a judgment rendered in another forum under a different law."³⁶ If, however, as often is the case, the initial and terminal points of the line are within the same state, but the message is circuitously sent through another in order to reach its destination, the message will not be classed as an interstate message and so governed by the laws applicable to such.³⁷

§ 434. Sunday messages—no duty to send.

As has been said at another place, telegraph companies may adopt and enforce reasonable regulations with respect to their office hours, and this embraces the right to close their offices on Sundays when the locality of the place does not necessitate them to do otherwise. With exception of works of necessity, it is not the duty of any institution, possessed with the principles of a public character to discharge any of its public duties on these days. So, it follows, that telegraph companies are not under any obligation to perform any of their common-law duties on Sundays, unless the performance of same is a matter of necessity. Of course, some of their offices are kept open on Sundays, especially where they are at places of some size,³⁸ in order that they may transmit messages concerning matters of necessity, and about other business matters which they desire to look after. For the reason that some of their offices may be closed on Sundays, by a right acquired under such a regulation, does not prevent the agent at those places from accepting messages for transmission, yet the acceptance is always conditional; and when this has not been removed and there has been a failure to promptly transmit the message, the company will not be liable. If there

³⁶ *Carnahan v. West. U. Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175.

³⁸ *Brown v. West. U. Tel. Co.*, 21 Pac. (Utah) 988.

³⁷ *Campbell v. Chicago, etc., R. Co.*, 53 N. W. (Iowa) 351.

were no conditions to the acceptance of a message, hardships and impositions might be imposed on these companies; for, a willingness of the operator at that particular place to accept the message might not be sanctioned, or, more than likely, not known by the operator at the place to which it is to be sent. In other words, it is not the duty of the telegraph operators to know the office hours of other stations,³⁹ and for this reason the agent may be willing to receive a message to transmit (he may further attempt to transmit the message), yet he may be prevented from doing so because of the fact that the other office, at the place to which the message is to be sent, is closed;⁴⁰ so, to hold the company liable, under such circumstances, would be unjust.

§ 435. Sunday contracts—void.

Ordinarily, contracts entered into and to be performed on Sunday, are void.⁴¹ It was not, however, considered under the common law that such contracts were invalid,⁴² and the statutes now do not generally prohibit the making of such contracts; but it is considered that, to enforce these, would be against public morals, and the contracting parties thereto should not be assisted by the courts in enforcing such. They both are *in pari delicto* and are not in a position to invoke the aid of the law.⁴³ As has been elsewhere stated, the employment of a telegraph company to transmit intelligence by means of its instru-

³⁹ Given v. West, U. Tel. Co., 24 Fed. 119.

⁴⁰ There is an implied condition that the terminal office is open: Thompson v. West, U. Tel. Co., 32 Mo. App. 191; West, U. Tel. Co. v. Harding, 103 Ind. 505.

⁴¹ Plaisted v. Palmer, 63 Me. 576; Meader v. White, 66 Me. 90, 22 Am. Rep. 551; Winfield v. Dody, 45 Mich. 355, 40 Am. Rep. 476; Bradley v. Rea, 103 Mass. 188, 4 Am. Rep. 524; Ryn v. Darby, 20 N. J. Eq. 230; Day v. McAllister, 15 Gray 433; Graerson v. Grass, 107 Mass. 439, 9 Am. Rep. 45; Butler v. Lee, 11 Ala. 885, 46 Am. Dec.

230; Woodman v. Hubbard, 25 N. H. 67, 7 Am. Dec. 310; Brimhall v. Van Campers, 8 Minn. 1, 82 Am. Dec. 118.

⁴² Bloom v. Richards, 2 Ohio St. 389; Adams v. Gray, 19 Vt. 365; Ames v. Kyle, 2 Yerg. (Tenn.) 31, 24 Am. Dec. 346.

⁴³ Schneider v. Sampson, 62 Tex. 203, 5 Am. Rep. 521; Ellis v. Hammond, 57 Ga. 179; Granson v. Gross, 107 Mass. 439, 9 Am. Rep. 45; Levet v. Creditors, 22 La. Ann. 105; Kinney v. McDermott, 55 Iowa 674, 8 N. W. 656, 39 Am. Rep. 191; Moore v. Kendall, 2 Penny (Wis.) 99, 52 Am. Dec. 145; Beauchamp v. Comfort, 42 Miss. 97.

ments and facilities, is a contract: therefore, a contract of this nature made with a telegraph company on Sunday, is void and no action can be based upon it.⁴⁴ In order to enforce any contract, the grounds upon, or the subject-matter about which it is made, must be clear of any immorality or illegality. As said, contracts made on Sunday are against public morals, and the grounds upon which such contracts are made are therefore not such as will justify the maintenance of a suit thereon and are unenforceable.

§ 436. Same continued—matters of necessity or charity.

It has never been questioned, where matters of charity or necessity are considered, that the law makes any distinction between Sunday and other days of the week; they are all regarded alike both as regards the validity of contracts and the right to engage in work or labor.⁴⁵ So, where a contract is made on Sunday for the sending of a message which concerns matters of necessity or charity, the company will be liable for a failure to transmit such message.⁴⁶ This is an exception to the rule that Sunday contracts are invalid. While this is the rule, the difficulty arises in determining what messages relate to matters of charity or necessity. Contracts to transmit messages regarding ordinary business, which can be sent on any weekday as well on Sundays are not within the exception to the general rule that ordinary business shall not be performed on Sunday; but there may be facts which would impress such a message as being one of necessity. The company must be informed, in some manner, of the nature of the message—whether it does or does not concern matters of charity or necessity.⁴⁷ This may be done either by the sender giving this information verbally, or the message may contain such facts on its face; and the burden, in any case, is on the sender to prove this fact.⁴⁸ If the message shows on its face that its object is to relieve the sick or suffering, to prevent great or irreparable injury to life

⁴⁴ *Rogers v. West. U. Tel. Co.*, 78 Ind. 169, 41 Am. Rep. 568; *West. U. Tel. Co. v. Yopst*, 118 Ind. 248, 3 L. R. A. 224n, 11 N. E. 16.

⁴⁵ *Troett v. Decker*, 51 Wis. 46, 37 Am. Rep. 808; *Edgerton v. State*, 67 Ind. 588, 33 Am. Rep. 110; *Pate v.*

Wright, 30 Ind. 476, 95 Am. Dec. 705.

⁴⁶ See notes 44 and 45 for cases.

⁴⁷ *West. U. Tel. Co. v. Yopst*, 11 N. E. 16, 118 Ind. 248, 3 L. R. A. 224n.

⁴⁸ *Troewert v. Decker*, 51 Wis. 46; *West. U. Tel. Co. v. Yopst*, 116 Ind. 349, 11 N. E. 16, 3 L. R. A. 224n.

or property, or if it is intended to secure the presence of a relative at the funeral of a kinsman, or if it is intended for any similar purpose, it may be regarded as one concerning matters of necessity or charity, and the company would generally be informed of such fact by the face of the message.

§ 437. Same continued—illustrations.

A message addressed to a physician, notifying him of the illness of the sendee's daughter and requesting him to come at once, sufficiently shows the necessity of its being sent at once.⁴⁹ A message to a person notifying him of the death of his father and requesting his attendance at the funeral, involves such a moral necessity that a contract for its transmission may be valid, although made on Sunday.⁵⁰ A husband, absent from home, sent to his wife a message by telegraph explaining his protracted absence, and announcing the time of his return. It was held that the sending of such a message involved a moral necessity, and the contract was therefore valid; nor was such a contract rendered illegal by the fact that the sender might as well have sent it on the preceding Saturday, but failed to do so through inadvertence.⁵¹ So, also, a message reading, "Bettie and baby dead, come to C. to-night to my help," sent by a person whose wife and child had just died, asking his father to come to his assistance, is one of necessity, and shows such necessity on its face.⁵² In another case, it appeared that the sender, the plaintiff in the case, was a stenographer, who had been engaged to make a report of a certain trial and to furnish notes of the evidence for a bill of exceptions. The time for filing such a bill was limited, and plaintiff, after working assiduously, furnished the report two days before the expiration of the time. It was necessary that the attorney managing the case should at once be informed, so that he might secure the signature of the judge before the term expired. He therefore sent the attorney this message, "Bring forty dollars if you want record," offering it for transmission on Sunday. The

⁴⁹ West. U. Tel. Co. v. Griffin, 1 Ind.

App. 46; Brown v. West. U. Tel. Co.,

21 Pac. (Utah) 988.

⁵⁰ West. U. Tel. Co. v. Wilson, 93 Ala.

32, 9 So. 414.

⁵¹ Burnett v. West. U. Tel. Co., 39 Mo. App. 559.

⁵² Gulf, etc., R. Co. v. Levy, 59 Tex.

543.

court allowed plaintiff to recover, holding that the message related to a matter of necessity, and there being a complete failure to send, the company could not urge that the message did not exhibit on its face the necessity.⁵³

§ 438. Statutory penalty—applicable.

This rule is applicable where the suit is brought for the purpose of recovering the statutory penalty imposed on these companies for a failure to promptly transmit a message. Thus, if the message is accepted by the operator on Sunday, but it does not show on its face that its contents concern matters of charity or necessity, and this fact has not been given to the operator in other ways, the company will not be liable for a statutory penalty imposed on it for a failure to promptly transmit the message; but should the operator be informed of the necessity of its immediate transmission, the company would be liable. If, however, the action is brought to recover, either the statutory penalty or the damages arising out of the breach of contract wherein the company has failed to promptly transmit and deliver a message concerning matters of necessity, and it is shown that the terminal office was closed, the company will not be liable, provided it is not located at a place whose size necessitates it to be opened. It seems, however, that if the receiving operator ascertain this fact, he should use reasonable diligence to inform the sender, in order that the latter may make other arrangements.

§ 439. Action of tort—rule not applicable.

It is a general principal of law, that if a passenger is injured by the negligence of the carrier, the fact that the injury was done on Sunday, or that the contract of carriage was made on Sunday, will be no defense for the company in an action brought to recover damages for such injury.⁵⁴ From an analogy to this principle, it would seem that, in those jurisdictions where the addressee may or

⁵³See note 48.

⁵⁴*Sutton v. Wanwatosa*, 29 Wis. 21, 2 Am. Rep. 534; *Platz v. Coehoes*, 89 N. Y. 219, 42 Am. Rep. 286; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126,

17 Am. Rep. 221; *Baldwin v. Barney*, 12 R. I. 392, 34 Am. Rep. 670; *Johnson v. Missouri Pac. R. Co.* 18 Neb. 690; *Smith v. New York, etc., R. Co.*, 46 N. J. L. 7.

should maintain his action in tort for the breach of the contract of sending the message, the fact that such contract was made on Sunday would be no defense to the company. The company, as said, may refuse to accept on Sundays any message not concerning matters of necessity, but should it accept such message, and negligently fail to promptly transmit it, the company would be liable although the contract for sending was made on Sunday. Thus, if it should accept a message which could ordinarily be sent during the weekdays, and furthermore, it was not sent on such days through the inadvertence of the sender, the company will be liable in damages, or for the statutory damages, for a failure to transmit it on that day.⁵⁵ The action is founded, not on the contract—which may be unenforceable, for the reason of its having been made on Sunday—but on the tort arising out of such contract.

§ 440. Forged and fraudulent messages.

Crimes may be committed by means of the telegraph, as through other similar agencies; and when it is shown that the company aids in the commission of a crime by carelessly or negligently discharging its duties, it will be liable for all damages arising out of such criminal act. This fact is more clearly shown by losses occurring in the transmission of forged and fraudulent messages. So, where a message of this nature is accepted and transmitted over a company's line, and the same is delivered to the addressee, who accepts it in good faith—believing it to be uncontaminated with such fraudulent purposes—and thereby complies with its objects to his injury, the company will be liable for all losses flowing directly therefrom, if it can be made to appear that the latter's agent, by the exercise of ordinary care, might have detected and prevented such fraud.⁵⁶ It is as much the duty of telegraph operators, while acting in the capacity of agent for these companies, to prevent crimes from being committed through the instrumentality of their lines as it is for persons acting in similar positions, or when they stand in a fiduciary relation toward the person on whom the crime or fraud is attempted to be perpetrated; and any

⁵⁵ See note 48.

U. Tel. Co., 45 N. Y. 549, 6 Am. Rep.

⁵⁶ *Strause v. West*. U. Tel. Co., 8 140.

Bliss. (U. S.) 104; *Elwood v. West*.

suspicious acts, made at the time of the attempted crime, which would lead a man of ordinary understanding to believe a crime or fraud was being perpetrated,⁵⁷ and with which he then fails to interfere, his negligence in failing to prevent such will be conclusively presumed, and he or his principal will, therefore, be liable for the damages arising from such acts. So, if at the time the message is delivered to the operator, there are circumstances attending the request to transmit which would give the operator reasonable ground to suspect that a fraud was about to be committed, his negligence in not attempting to prevent same will be conclusively presumed.⁵⁸

§ 441. Same continued—negligence must be proximate cause.

In order to hold the company liable for losses caused by its operator's negligently permitting a forged or fraudulent message to be transmitted, it must be shown that such negligence was the proximate cause of the injury,⁵⁹ although it may be clear that, except for the negligence of the operator, the loss would not have happened.⁶⁰ In other words, there must be a connection between the wrong alleged and the resulting injury; in the contemplation of law, they stand related to each other as cause and effect so as to give a right of action against the wrongdoer and make him chargeable with the loss.⁶¹ It is

⁵⁷ West. U. Tel. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1.

⁵⁸ In the case of Elwood v. West. U. Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140, it appeared that the plaintiff, B. & Co. were brokers, doing business at P. in Pennsylvania. On August 12th they received this telegram: "From Erie, Pa., dated August 12th. Forwarded from Pipersville, 12 M. received Aug. 12th. To P. & Co. P., Pa.:—Keystone Bank will pay the check of T. F. McC. to the amount of twenty thousand dollars (\$20,000.00) Keystone Bank." The plaintiff observed that the name of the officer of the bank had been omitted, and a second message was then received with the addition of words "J. J. Town, cashier of Keystone Bank." Near the close of the

day McC. presented himself at the plaintiff's banking house and drew ten thousand dollars on the faith of the telegram, leaving an equal sum to his credit. It appeared that the telegram was fraudulent; that McC. himself had presented the telegram at Titusville for transmission; that the operator knew McC. by that name; and that he showed no authority from the cashier when he offered the message for transmission. It was held that the company was liable to the plaintiffs for the loss sustained by them, since the operator had been guilty of negligence in not detecting so palpable a fraud.

⁵⁹ West. U. Tel. Co. v. Lowery, 60 N. Y. 198, 19 Am. Rep. 154.

⁶⁰ Id.

⁶¹ Id.

not every breach of duty which will be a sufficient ground on which to base an action; for, while it may be a causing cause which brings about a loss for injury, yet it may not be the direct, natural or proximate cause of such injury. The proximate cause of the injury may be one of the results of the breach of the operator's duties; but this may be acted upon by other intermediate causes which would effect the breach, as being a remote or indirect cause of the injury, and which fact would relieve the company from liability. In a case in which this point was at issue it appeared that the sender transmitted a message to the plaintiff, asking for a loan of five hundred dollars. By mistake the message was transmitted as asking for five thousand dollars. The money was sent and the original sendee, overcome by cupidity, absconded with it. It was held that the company was not liable, since the injury did not result as a proximate cause of its negligence. The court said in this case: "The plaintiff parted with his money by reason of the message, believing it to have been sent by Brown. He was willing to trust him with \$5,000, and the mistake of the company did not induce the confidence which the plaintiff had in his integrity. . . . The embezzlement could not reasonably have been expected, and did not naturally flow from the wrong of the defendant."⁶²

§ 442. Same continued—operator author of forged message.

Not only is a telegraph company liable in damages for injuries caused by the transmission of a forged or fraudulent message, whose author is some one not connected with the company, but it is also liable when the message was fraudulently made and sent by its own operators.⁶³ The ground on which these companies have attempted

⁶² Id.

⁶³ *Pac. Postal Tel. Cable Co. v. Palo Alto Bank (C. C. A.)*, 109 Fed. 369, 54 L. R. A. 711; *McCord v. West. U. Tel. Co.*, 39 Minn. 181, 1 L. R. A. 143n, 12 Am. St. Rep. 636. In the last case, the local agent of the telegraph company, who was also the local agent for the express company sent a dispatch to merchants in a neighboring

city requesting them to forward money to their correspondent at the former place to be used in buying grain: he forged the name of the agent employed by the addressee to purchase wheat for them. The dispatch was duly received, and the money in good faith forwarded by express: but the local agent intercepted the package and converted the money. It was held

to exonerate themselves from liability in such cases is that the maxim, *respondet superior*, does not apply, because the operator in sending the message was not acting for the company but for himself and about his own business, and should be treated as having transcended his authority and not acting in furtherance of the company's business. The general rule, with few exceptions, that the liability of masters for wrongs of their servants, is not confined solely to those classes of cases where the acts complained of are done in the course of the employment and in the furtherance of the master's business or interest.⁶⁴ There are certain duties which the master, when exercising a public function, owes to the public. One of these is, he must abstain from committing such acts as will become an injury to the public; so, if the master's servant, while in the discharge of his general duties as such, should, by his own act, occasion a violation of such duty, the master will be liable, whether the duty be founded in contract or be a common-law duty growing out of the relation in which

that the telegraph company must answer to the addressee for the loss, the proximate cause thereof having been the wilfull wrong of the company's agent. The court, said: "If the corporation fails in the performance of its duty (as to sending messages) through the negligence or fraud of the agent whom it has delegated to perform it, the master is responsible. It was the business of the agent to send dispatches of a similar character. Such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As for him, therefore, it must be deemed the act of the corporation." In *Magouirk v. West. U. Tel. Co.*, 79 Miss. 632, 89 Am. St. Rep. 663, an agent of the defendant company sent this message: "Mr. G. Ellisville. Be sure to go to Heidelberg. Am on excursion," and forged plaintiff's name to it. Plaintiff was an unmarried wo-

man and the addressee an unmarried man with whom she had but a slight acquaintance. After sending the message, the agent boasted of having sent it and paraded its contents before the public. It was held that his acts were within the scope of his employment and that the company was liable to plaintiff for the mortification and injury occasioned to her. It was also held that plaintiff might show the agent's habits as to the use of intoxicants as indicating his unfitness for the position he held. See also *New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338.

⁶⁴ *McCord v. West. U. Tel. Co.*, 39 Minn. 181, 1 L. R. A. 143n, 12 Am. St. Rep. 638. Compare *Matt v. Consumers' Ice Co.*, 73 N. Y. 543; *Fishkill Savings Institution v. Nat. Bank*, 80 Ind. 162, 36 Am. Dep. 599; *Potului v. Sanders*, 37 Minn. 517.

the master stands.⁶⁵ The wrongful act of the agent is the proximate cause of the injury, and the fact that the addressee may have relied upon the confidence and reliability of the sender, whose name was forged and fraudulently attached to the telegram, will not be such contributory negligence as to prevent him from recovering; although, if he had not been misled by such wrongful act, the rule would be otherwise. But in these cases, where the message has been forged by the company's operator, he is misled. If it were the business of the operator to send messages of similar character, and the injured party had been in the habit of accepting them in good faith, he could not know the circumstances in any particular case that would make the particular act wrongful and unauthorized. As to him, therefore, the acts would be misleading and should be considered as flowing directly from the company.⁶⁶

§ 443. Same continued—sub-agent, forgery of.

The above rule is applicable where the message is forged by a sub-agent of the company who was appointed by one of the company's operators having no authority to make such appointment. In a case on this point, the sub-agent sent a false message purporting to come from the cashier of a bank, directing another bank to pay a fictitious person a sum of money; he then impersonated the fictitious person, and obtained the money. No negligence on the part of the bank was shown. It was held that the company was responsible to the bank for the amount thus obtained. The court reasoned that, although a principal is not bound by a contract made in his name by a sub-agent appointed by his agent without authority, yet he is responsible for the negligence of such sub-agent, if the agent who appointed him was at the time acting in the business of his principal and the sub-agent was transacting such business.⁶⁷

§ 444. Same continued—no bar to action *ex delicto*.

It has been attempted to be shown that where an injury has occurred by the negligent transmission of a forged or fraudulent draft,

⁶⁵ *Sherman and Redfield on Neg.* 4 Minn. 181, 12 Am. St. Rep. 638, 1 L. Ed., §§ 149, 150, 154; *Taylor on Corp.* R. A. 143n, 39 N. W. 315.
2 Ed., § 145.

⁶⁷ *State Bank v. West. U. Tel. Co.*

⁶⁸ *McCord v. West. U. Tel. Co.* 39 52 Cal. 280.

sent by means of a telegraph company, the injured party should first seek his remedy against the indorser of the draft by an action *ex contractu*; but it is generally held, that he may seek his remedy against the company for the breach of its duty toward him, or by an action *ex delicto*, although one of the indorsers of the note is solvent and amply able to indemnify him for his loss.⁶⁸ As was said by Gresham, J., by way of illustration of this rule: "If a railroad train is wrecked by the carelessness of a drunken engineer, the injured passengers have two remedies; one against the engineer for the tort, and the other against the company on the contract. In an action by the passenger in such a case against the engineer, the latter would not be allowed to plead against all but nominal damages that the passenger had a remedy against the solvent carrier."⁶⁹

§ 445. Amount of damages.

Having considered the liability of the telegraph companies for damages occurring in the transmission of forged or fraudulent messages, the question which necessarily follows is, What damages can be recovered in such cases? The general rule is that the addressee can recover only such actual damages as he may have sustained in the particular case. In other words, he can recover in damages the amount of money of which he was defrauded, less that which he may have recovered from the defrauder. Therefore, he cannot recover from the company the fees which he has paid an attorney for collecting that from the defrauder, nor the costs which may have accrued in its collection. As before said, the addressee may refuse to prosecute the defrauder or his confederate but enforce his remedy against the telegraph company. If this should be the course pursued, the amount of which he was defrauded could be recovered. The fact that he has pursued this course will not prevent the company from recovering from the defrauder the amount which it has paid to the addressee.⁷⁰

⁶⁸ *Strause v. West. U. Tel. Co.*, 8 Biss. (U. S.) 104; *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa 160, 77 N. W. 1034, 70 Am. Rep. 181; *Bank of Cal. v. West. U. Tel. Co.*, 52 Cal. 280.

⁶⁹ *Strause v. West. U. Tel. Co.*, 8 Biss. (U. S.) 104.

⁷⁰ *Pac. Post. Tel. Cab. Co. v. Palo Alto Bank (C. C. A.)*, 109 Fed. 369, 54 L. R. A. 711. Exemplary damages may

§ 446. Connecting lines—passage over—initial line—general rule.

By the analogy to the principle governing the liability of common carriers of goods, the general rule is, that a telegraph company is not bound by law to accept and transmit messages beyond the terminus of its own line. In the absence of any agreement, either express or clearly implied, for transmission beyond its own line, the common-law duty of an independent company is performed when it safely transmits the message over its own line and delivers it promptly and correctly to the connecting line, and it is not therefore liable for any errors or delays occurring on the other line.⁷¹ If, in such case, the message is to be delivered by the initial line to a connecting line for further transmission, the former is considered as a forwarding agent and is not liable for the defaults of the subsequent line or lines. It may be said here, however, that the whole duty of the initial company is not always performed by merely tendering the message promptly and correctly to the connecting line. If the latter should refuse to accept the message, it is the duty of the initial company to make a reasonable effort to inform the sender of this fact. It is the general rule, with some exceptions, that the connecting line should accept the message under agreement of the original contract of sending, but should the message be accepted conditionally, with respect to such agreement, it is the duty of the initial company to inform the sender of this fact. It is within the discretion of the sender to choose the connecting company over whose lines he may desire the message to be transmitted, and when such selection has been made it is the duty of the initial company to deliver the message to this line.

§ 447. Same continued—English rule.

The rule in England, with respect to the liability of the initial company for losses occurring on connecting lines, is different from

be recovered where there is such gross negligence on the part of the agent as to indicate wantonness or a malicious purpose in failing to transmit and deliver the message: *West v. West. U. Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; *Elwood v. West. U.*

Tel. Co., 45 N. Y. 549, 6 Am. Rep. 149.

⁷¹ *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Gulf. etc., R. Co. v. Baird*, 75 Tex. 256, 12 S. W. 530; *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St.

that generally held in the United States.⁷² It is held in England that, where a common carrier accepts goods which in order to reach their destination, must necessarily be transported over other lines, the initial carrier, in the absence of an agreement to that effect, is liable for all losses not caused by the act of God or the public enemy, which may be incurred either over its own or the connecting carriers lines. The ground on which they so hold is, that the connecting lines are operating in the capacity of agent toward the initial line, and that the latter is bound for all acts of its agent. There are some of our states which have adopted this rule, and in these it will likely be found that telegraph companies, accepting messages to be transmitted over connecting lines, are liable for all errors or delays made over the latter.⁷³ It is held, however, under this rule, that the carrier may by an agreement limit its liability to its own line.⁷⁴ On the blank forms used by these companies, there is usually a stipulation that the initial company is to act as agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. This stipulation has been held to be reasonable and is binding on the sender when he attaches his signature to the message. This being the case it is seldom that the English rule can be enforced against the telegraph companies.⁷⁵

§ 448. Accept all the charges—rule not changed.

It is generally the case, when messages are sent over connecting lines in order to reach their destination, that the initial company re-

Rep. 165. Compare *Blodgett v. Abbott*, 72 Wis. 516, 40 N. W. 491, 7 Am. St. Rep. 873; *McLaren v. Detroit, etc., R. Co.*, 23 Wis. 138; *St. Louis, etc., R. Co. v. Marrs (Ark.)*, 31 S. W. 42.

⁷² *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530.

⁷³ *Atehison, etc., R. Co. v. Roach*, 35 Kan. 740, 57 Am. Rep. 199, 12 Pac. 95.

⁷⁴ *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *McCarn v. Int., etc., R. Co.*, 84 Tex. 352, 19 S. W. 547, 31 Am. St. Rep. 51; *West. U. Tel. Co. v. Simms*,

30 Tex. Civ. App. 32, 69 S. W. 464; *Gulf, etc., R. Co. v. Geer*, 5 Tex. Civ. 349, 24 S. W. 86.

⁷⁵ Although the stipulation may not show that the message would pass over a connecting line, the sender is nevertheless put upon inquiry and cannot hold the initial company liable for errors occurring on another line on the ground that he was ignorant of the fact that defendant's lines did not extend to the destination: *West. U. Tel. Co. v. Carew*, 15 Mich. 525.

ceives from the sender all the charges for transmitting the message over the entire route. In fact, another arrangement could not be so conveniently used. This does not, however, make the initial company liable for any errors made over the connecting line.⁷⁶ There is one case holding a contrary view, but we think this is an erroneous holding.⁷⁷ With respect to the collection of the charges by the initial company for the connecting lines, the former acts in the capacity of agent for the latter. These charges are collected by the initial company and held until a settlement is made with the connecting lines, when they are divided among them in the proportion each of these lines bear to the entire line over which the message is transmitted. This is the general rule by which the charges are divided; and it may be safely said that the initial company acts only as agent for the others in the collection of the charges, and is not therefore liable for the errors of the others.

§ 449. Initial company—diligence to deliver to other line.

As said in a previous section, the initial company has not performed all of its duties by delivering the message to the connecting line, but it must further exercise due diligence in making a prompt delivery to this company; and any loss arising out of such delay will subject the former to the loss.⁷⁸ Thus, where the company undertakes to transmit the message to the terminus of its line, and there forward it by mail, a delay of three days in mailing it is negligence for which it will be liable.⁷⁹ The initial company will be liable if a delay on its part causes a greater delay on the connecting line.⁸⁰ It is further the duty of the initial company to exercise a reasonable effort to inform the sender that the connecting company refuses to accept the message, or that its lines are out of working order.⁸¹

§ 450. Same continued—telephone—same rule applied.

The above rule applies to telephone companies where they carry on long-distance services. Thus, if a telephone company accepts a mes-

⁷⁶ *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 1657.

⁷⁷ *West. U. Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429, 21 S. W. 109.

⁷⁸ *West. U. Tel. Co. v. Seals*, 45 S. W. (Tex.) 964.

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⁷⁹ *West. U. Tel. Co. v. McIlvoy*, 107 Ky. 633, 55 S. W. 428.

⁸⁰ *Weatherford, et al. v. R. Co. v. Seals*, 41 S. W. (Tex.) 841.

⁸¹ *West. U. Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345, 69 S. W. 122.

sage for transmission and it becomes necessary for the message to be communicated over other lines in order to reach its destination, the initial company must promptly and correctly deliver the message to the connecting line, and, after this has been done, it will not be liable for any errors occurring over the connecting lines. But it was held in one case, where the operator at the terminus of the initial line was also the operator of the connecting line—or, in other words, when the same party was the common operator of the initial and the connecting line at the place of their connection—that for an error caused on the latter line by his negligence, the former company will be liable.⁸² When the telephone is not doing long-distance service, it is not its duty, in the first place, to accept a message whose destination is beyond its terminus: but should such a message be accepted, and the connecting line refuse to accept the message, the former will not be liable for such non-acceptance.

§ 451. Special contract—may become liable by.

While the general law rule is, that a telegraph company is only liable for such errors as may occur on its own line, yet it may contract so as to bind itself for the negligence of connecting lines as well as for its own,⁸³ even though the extra-terminal connecting line extends into another state or country.⁸⁴ This proposition, although well settled, was at first closely questioned on the ground that contracts for liability beyond its terminus, specified in the charter, were *ultra vires*.⁸⁵ If, therefore, a telegraph company should contract to transmit a message beyond its terminus, it will be liable for all damages

⁸² *Southwestern Tel. etc., Co. v. Taylor*, 26 Tex. Civ. App. 79, 63 S. W. 1076.

⁸³ *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458, 20 Am. Rep. 605. See also *Crouch v. Great Western Railway*, 2 Hurt. & N. 491; *Great Western Railway Co. v. Crouch*, 3 Hurt. & N. 183; *Grand Trunk R. Co. v. McMillan*, 16 Can. Sup. Ct. R. 543, 42 Am. & Eng. R. Cas. 468.

⁸⁴ *West. U. Tel. Co. v. Carter*, 24 Tex. Civ. App. 301, 58 S. W. 734. See also *Burtis v. Buffalo, etc., R. Co.*, 24 N. Y. 269; *Phillips v. N. C. Co.*, 78 N. C. 294; *Linley v. Richmond, etc., R. Co.*, 88 N. C. 547; *McCorn v. Inter, etc., R. Co.*, 84 Tex. 352, 19 S. W. 547.

⁸⁵ *Perkins v. Portland, etc., R.*, 47 Me. 573; *Root v. Great Western R.*, 45 N. Y. 524; *Hill Mfg. Co. v. Boston, etc., R.*, 104 Mass. 122.

caused by any delay, or by any errors made on the connecting line, just the same as if the error was made on its own line.

§ 452. Same continued—who may contract.

The courts hold that the agent's authority to receive goods for carriage implies authority to contract for extra-terminal liability.⁸⁶ The rule of telegraph companies is in this respect similar to these holdings.⁸⁷ In other words, where a telegraph company carries on a general telegraphic business, it may make a contract to send the message to its destination, and in the absence of the proof to the contrary, the receiver of a telegraph company will be presumed to have authority to make such a contract. Any other holding would be contrary to good reason. As said before, these contracts are matters of convenience to the general public, in that the sender is not compelled to make contracts with the connecting lines, but may accomplish his purpose by making one contract for the entire route. Then, if the company has this right, and it is a matter of convenience to the public, surely the company should delegate the authority to some of its agents, conveniently situated to the public, and it will be presumed that the operators have this authority.

§ 453. Where statutes make the initial carrier liable.

The rule that carriers may contract against extra-terminal liability has been applied even where a statute provides that a common carrier, receiving property to be "transmitted from one place to another within or without the state," or "issuing receipts or bills of lading in the state," should be liable for losses to such property by its negligence or that of other companies to which it may be delivered for further transportation. In many states there have also been statutes adopted which make telegraph companies common carriers; and, of course, where this is the case the same rule will be applicable to such companies. It has been held that the effect of these statutes was

⁸⁶ *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421; *Seothorn v. South, etc., R.*, 8 Exch. 341; *Pickerson R. M. Co. v. Grand Rapids, etc., R. Co.*, 67 Mich. 110, 34 N. W. 269; *Taylor v. Maine Cent. R. Co.*, 87 Me. 209, 32 Atl. 905.

⁸⁷ *Jones v. Roach*, 21 Tex. Civ. App. 301, 51 S. W. 549.

merely to prescribe a definite rule of evidence, substantially the same as the English rule, whereby a prima facie liability would be established in the absence of a specific contract against extra-terminal liability.⁸⁸ The decisions on these statutes have been modified by later decisions in such a way that the carrier may limit its liability to the terminus of its own route, yet it cannot contract for a through shipment and at the same time exempt itself from liability on account of the negligence of the connecting line.⁸⁹ It was held that these contracts were not invalid as regulating or interfering with interstate commerce.⁹⁰

§ 454. Actions on extra-terminal contracts—against whom.

When a contract has been made to transmit a message beyond the terminus of its line, the question which confronts us is, Against whom should the action be brought when a loss has been incurred by a delay or by an error in its transmission? Under the English rule, where it is understood, by an implied contract, that the initial company has assumed the responsibility of a safe transmission of the message to its destination, it is held that the action must be brought against the initial company, although the negligence may have occurred on another line.⁹¹ This rule has been followed by one of our state courts.⁹² But most of the courts hold that where an express contract has not been made by the initial company to transmit the message to its destination, the action must be brought against the company in default.⁹³ In some jurisdictions, the English rule is so far

⁸⁸ *Dimmitt v. Kansas City, etc., R. Co.*, 103 Mo. 433, 15 S. W. 761; *Watkins v. St. Louis, etc., R. Co.*, 44 Mo. App. 245.

⁸⁹ *White v. Ashton*, 51 N. Y. 280; *Hinckley v. N. Y., etc., R. Co.*, 56 N. Y. 429.

⁹⁰ *Bogg v. Wilmington, etc., R. Co.*, 14 S. E. (N. C.) 79; *Solon v. Chicago, etc., R. Co. (Iowa)*, 63 N. W. 692.

⁹¹ *Collins v. Bristol, etc., R. Co.*, 11 Exch. 790; *Coxan v. Great Western R. Co.*, 5 Hurl. & N. 274; *Grand*

Trunk R. Co. v. McMillan, 16 Can. Supt. Ct. R. 543.

⁹² *Masher v. South. Ex. Co.*, 38 Ga. 31.

⁹³ *Illinois Cen. R. Co. v. Cowles*, 32 Ill. 116; *Anchor Line v. Dater*, 68 Ill. 369; *Aigen v. Boston, etc., R. Co.*, 132 Mass. 423. While these cases pertain to connecting carrier of goods, yet the same rule applies to telegraph companies. In *Smith v. West. U. Tel. Co.*, 84 Tex. 539, 31 Am. St. Rep. 59, it was held that the analogy of connecting telegraph lines to connecting rail-

adopted as to make the initial company liable upon an implied contract for extra-terminal liability where no such contract would be implied under the rule of our country; but there is only one state which has adopted the English rule to its fullest extent. If, however, as we will hereafter state, there is any kind of a partnership arrangement between the initial and the connecting lines, suits may be brought against either.

§ 455. Connecting lines.

Having considered to some extent the duties and liabilities of the initial companies, we shall now say something about the duties and liabilities of connecting companies; and first, we shall see what is understood by the term "connecting telegraph companies." A "connecting telegraph company" is one whose lines are situated and extend somewhere, in whole or in part, between the initial line and the place to which a message may be desired to be sent.⁹⁴ The line may be entirely between these two, or the point of destination may be on the line of the connecting company. In order for it to be a connecting line, there must be another line intervening between this one and the place at which the message is first tendered for transmission. In other words, there must be a connection between the two lines, and the connecting company must not be on the initial line, or the company first accepting the message for transmission.

§ 456. Same continued—duty to accept messages tendered.

It is the duty of the connecting company to accept all messages tendered it by the initial line. It is as much the duty of this company to accept these messages as it is for the initial company to accept them. There have been statutes adopted in some of the states which attempt to enforce this duty, but it is held that these statutes are only declaratory of the common-law duty,⁹⁵ and that it is as much

ways is so great that the established rules of law which determine the liability of the latter should be applied with equal force to the former.

⁹⁴ Hutchinson on Carriers (2 Ed.), § 157a.

⁹⁵ U. S. Tel. Co. v. West. U. Tel. Co., 56 Barb. (N. Y.) 46; Baldwin v. U. S. Tel. Co., 6 Abb. Pr. N. S. (N. Y.) 405. In the last case, it was held that under a statute requiring connecting telegraph companies to re-

the duty of these companies as if no statute had been enacted. It is generally held, however that this duty only applies where the message is destined to some point on its line; and that it is not the duty of these connecting lines to accept a message whose destination is at some point beyond the terminus of its line. If the company, however, undertakes, as part of its regular business, to transmit messages beyond its terminus, it would be part of its duty to accept all messages of like nature, but in doing so it may affix reasonable conditions and limitations to its liabilities.⁹⁶

§ 457. Same continued—duty of.

The duties of a connecting line are similar to those of the initial company. Thus, where there is more than one message delivered by the latter to a connecting line, it must accept and transmit each in the regular order of time in which they are received without any discrimination. In some instances, on the account of the nature of the message, there may be an exception to this rule, the same as enjoyed by the initial line. It must exercise due diligence in making a prompt and correct transmission of the message, and should use the same diligence to make a prompt delivery of it as the initial line, if the latter's line extends to the point to which it is sent.⁹⁷ When it is necessary to transmit the messages over another connecting line, in

ceive and forward messages, transmitted for the purpose upon each other's line, a company receiving a message to be forwarded, in part, over such connecting line, is to be regarded as authorized to make the contract respecting its transmission for such line; and the receipt by the former company, of an entire price for the message is a sufficient consideration for the express or implied obligation resulting against such connecting company.

⁹⁶West. U. Tel. Co. v. Way, 83 Ala. 542, 4 So. 844; Pitlock v. Wells, 109 Mass. 452; U. S. Tel. Co. v. West. U. Tel. Co., 56 Barb. (N. Y.) 46; West. U. Tel. Co. v. Taylor, 3 Tex.

Civ. App. 310, 22 S. W. 532. In the case of the West. U. Tel. Co. v. Stratemeier (Ind.), 32 N. E. 871, plaintiff asked the agent whether it had a line and receiving station at a certain point, and upon being informed that it had, he delivered to the agent a message directed to such point, relying entirely on the operator's representations. In an action for failure to deliver such message, it was held that the company was estopped to deny that it had no line or receiving station at the point named.

⁹⁷West. U. Tel. Co. v. Lyman, 3 Tex. Civ. App. 460, 22 S. W. 656; Martin v. West. U. Tel. Co., 1 Tex. Civ. App. 143.

order to reach its destination, the intermediate or first connecting line should make a prompt delivery of the message to this connecting line.⁹⁸ As heretofore said, the sender may select the connecting line over which his message should be sent, but if for any reason this line selected refuses to accept, or cannot transmit the message, the connecting company should use reasonable efforts to notify the sender of this fact; and if the information cannot be imparted to him, then it is the duty of the company to select some other suitable route for the transmission of the message.

§ 458. Liability of connecting lines.

The liabilities of the connecting company are also somewhat similar to those of the initial lines. The connecting company's liability does not, however, begin to run until the message has been actually delivered to it.⁹⁹ The connecting company cannot, as a rule, be held for the negligence of the initial or of the other connecting lines in the absence of a partnership, express or implied.¹⁰⁰ Thus, if a delay on the first line causes a greater delay on the connecting line, the latter will not be liable.¹⁰¹ If there is a delay in delivering the message after it has been transmitted, the last line will be liable.¹⁰² But sometimes, because of the relation of principal and agent, and more frequently because of some partnership arrangement existing between the lines, one connecting line has been held liable for the negligence of some of the other lines. If several of these companies have been guilty of negligence in the transmission, that one will be held responsible whose negligence was the proximate cause of the loss complained of.¹⁰³ Thus, where the addressee's name is negligently changed by

⁹⁸ *Smith v. West. U. Tel. Co.*, 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59.

⁹⁹ *Missouri Pac. R. Co. v. Wichita, etc., Co.*, 55 Kan. 525, 40 Pac. 899; *Condon v. Marquette, etc., R. Co.*, 55 Mich. 218; *Peterson v. Case*, 21 Fed. 885.

¹⁰⁰ *Montgomery, etc., R. Co. v. Moore*, 51 Ala. 394; *Knott v. Raleigh, etc., R. Co.*, 98 N. C. 73, 2 Am. St.

Rep. 321; *Lowenburg v. Jones*, 56 Miss. 688, 31 Am. Rep. 379; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165.

¹⁰¹ *Weatherford, etc., R. Co. v. Seals (Tex.)*, 41 S. W. 841.

¹⁰² *West. U. Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638.

¹⁰³ *West. U. Tel. Co. v. Munford*, 87 Tenn. 190, 10 S. W. 318, 2 L. R. A. 601n, 10 Am. St. Rep. 630.

one of the lines, but the error is corrected by another line, the negligence of the first will not be the proximate cause of the loss, if it were not otherwise negligent.

§ 459. Burden of proof.

It has been held that where a loss has occurred in the transportation of goods, it is presumed that the loss occurred on the last connecting line.¹⁰⁴ But this rule has been held by many able courts and text-writers to be unsound.¹⁰⁵ The general rule of telegraph companies in this respect is, that, where any connecting line is sued, the presumptions are that it was guilty of negligence and the burden is upon it to show that the delay or error did not occur on its line.¹⁰⁶ The reason for holding to such a rule is, that the facts of its guilt or innocence lies more within the knowledge of the company than it does in the sender or the injured party. As said in a former part of this work, it would be an unreasonable rule to require the injured party to show the negligence of the company which lies more peculiarly within the knowledge of the latter. To enforce such a rule would be nothing more nor less than the defeat of every case brought against these companies for losses or injuries. The more reasonable rule, therefore, would be, to cast the burden of proof upon the connecting line sued.

§ 460. Partnership arrangements between the several lines.

Telegraph companies may have some kind of partnership arrangement, with respect to messages transmitted over their respective lines, and when such is the case each will be liable for the negligence of the other.¹⁰⁷ The difficulty in these cases is, proving the partnership. This relation of liability of connecting companies may exist

¹⁰⁴ Tex., etc., R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; Lindley v. Richmond, etc., R. Co., 88 N. C. 547; Savannah, etc., R. Co. v. Harris, 26 Fla. 148, 7 So. 544, 23 Am. St. Rep. 551; Beard & Sons v. Ill. Cen. R. Co., 79 Iowa 518, 44 N. W. 800, 18 Am. St. Rep. 381, 7 L. R. A. 280.

¹⁰⁵ Missouri Pac. R. Co. v. Breeding,

4 Tex. Civ. App. 217, 16 S. W. 184; Gulf, etc., R. Co. v. Holder (Tex.), 30 S. W. 383; Evans v. Atlanta, etc., R. Co., 56 Ga. 498; Goodman v. Oregon, etc., R. Co., 22 Ore. 14, 28 Pac. 894.

¹⁰⁶ West. U. Tel. Co. v. Munford, 87 Tenn. 190, 10 Am. St. Rep. 630.

¹⁰⁷ Baldwin v. U. S. Tel. Co., 45 N. Y. 744, 6 Am. Rep. 165; West. U. Tel. Co. v. Lovely, 52 S. W. 563.

as to third persons without its existence toward each other.¹⁰⁸ But it has been held that the mere fact of one company regularly receiving messages to be sent over its own and that of another line, was not of itself sufficient evidence of a partnership, whereby one would become responsible for the negligence of the other.¹⁰⁹ Yet, where these companies have associated themselves under a contract for a division of the profits, made in the contract for sending, in a certain proportion of the receipts after deducting the expenses incurred in the transmission of the message, they become jointly liable as partners to third persons.¹¹⁰ But "where the agreement is that each shall bear the expenses of his own route, . . . and the gross receipts shall be divided in proportion to distance, they are partners neither *inter se* nor as to third persons, and incur no joint liability."¹¹¹

§ 461. Effect of contract of sending on connecting lines.

If a connecting company is designated as such in the original contract for sending, or if the blank form of the company provides that all stipulations therein shall enure to the benefit of all the connecting lines, then, having accepted the message thereunder without requiring any separate contract, it becomes virtually a party to the contract and is bound by all the undertakings therein and benefited by all the limitations.¹¹² If, however, no connecting line is designated in the mes-

¹⁰⁸ Block v. Fitchburg R. Co., 139 Mass. 308; Wyman v. Chicago, etc., R. Co., 4 Mo. App. 35; Hood v. N. Y., etc., R., 22 Conn. 1; Brooks v. Grand Trunk R. Co., 15 Mich. 332.

¹⁰⁹ Baldwin v. U. S. Tel. Co., 45 N. Y. 744, 6 Am. Rep. 165; West. U. Tel. Co. v. Stratemeyer, 6 Ind. App. 125.

¹¹⁰ Hutchinson on Carriers (2 Ed.), § 169; Hart v. Rensselaer, etc., R. Co., 8 N. Y. 37, 59 Am. Dec. 447; Peterson v. Chicago, etc., R. Co., 80 Iowa 92, 45 N. W. 573. An action to recover is statutory penalty, based on the failure of the last line to deliver a message, cannot be maintained against such line and the initial line jointly, there being no joint default

and no claim of a joint conduct of business: Chandler v. West. U. Tel. Co., 94 Ga. 442, 21 S. E. 832.

¹¹¹ Hutchinson on Carriers, 2 Ed. § 169; Converse v. Norwick, etc., Tel. Co., 32 Conn. 166; Hot Springs, etc., R. Co. v. Tripp, 42 Ark. 465, 48 Am. Rep. 65; Grass v. N. Y., etc., R. Co., 99 Mass. 220; Irwin v. Nashville, etc., R. Co., 92 Ill. 103.

¹¹² West. U. Tel. Co. v. Smith, 26 S. W. 216; Adams Ex. Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214n; U. S. Ex. Co. v. Harris, 51 Ind. 127; St. Louis, etc., R. Co. v. Weakley, 50 Ark. 397, 7 Am. St. Rep. 104; Halliday v. St. Louis, etc., R. Co., 74 Mo. 154, 41 Am. Rep. 309; Maghee v.

sage, but the selection is left to the initial company, and the stipulations contained in the blanks used by the first company do not provide that they will enure to the benefit of any other line, the connecting line cannot claim any benefit growing out of the original contract.¹¹³ And it has been held that where a statute requires connecting companies to accept messages from other lines, the fact that it has complied with the statutes cannot be considered as a ratification of the original contract.¹¹⁴ It is seldom that the sender exercises the right to select the connecting line, but when he does, these companies seldom acquire any of the benefits of the original contract, because there are generally to be found stipulations in these contracts which provide that the company will not be liable for delays and errors beyond the terminus of its own line.

§ 462. Liability for defaults of common agent.

It occasionally happens that connecting telegraph companies have a common agent or operator, and the question is, Whether or not they will be jointly liable for his defaults? The question has been answered—and correctly we think—in the affirmative, but they are not liable for each other's faults.¹¹⁵ We think the fact that he is acting for both companies may be considered, with other circumstances, as tending to show a joint liability or a partnership arrangement, and if they hold him out as having authority to make them jointly liable, he may do so in favor of one who rightfully relies on the apparent authority; although in fact he has no such authority.¹¹⁶

§ 463. Sender's right to select route.

As said elsewhere, there is generally a stipulation in the message blanks to the effect that the company will not be liable for delays and

Camden, etc., R. Co., 45 N. Y. 514, 6 Am. Rep. 125; West. R. Co. v. Harwell, 97 Ala. 341, 11 So. 781.

¹¹³ Squire v. West. U. Tel. Co., 98 Mass. 232, 93 Am. Dec. 157. See, also, Adams Ex. Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214n; Bancroft v. Merchants', etc., Co., 47 Iowa 262, 29 Am. Rep. 482; Cen. R., etc., Co. v. Bridger, 94 Ga. 471, 20 S. E. 349.

¹¹⁴ Gulf, etc., R. Co. v. Bwyer, 75 Tex. 572, 7 L. R. A. 478; Same v. Baird, 75 Tex. 256, 12 S. W. 530.

¹¹⁵ Hutchinson on Carriers (2 Ed.), § 169; Smith & Elliott v. Mo., etc., R. Co., 58 Mo. App. 80.

¹¹⁶ Midland Railway v. Bromley, 17 Com. B. 372; Chicago, etc., R. Co. v. Northern, etc., Co., 70 Ill. 217; Southwestern, etc., Tel. Co. v. Taylor, 26 Tex. Civ. App. 79.

errors made beyond the terminus of its own line, and will only act as the sender's agent to engage the services of another connecting line. When this is the case, it is the right of the sender to name the route the message shall go after it reaches the terminus of the initial line. It was decided in a case on this subject, where the destination could be reached from the company's terminus by two telephone lines, that the sender had the right to indicate which line should be used, although it was the rule of the company that the message should be sent over the nearest line that was open, and that it was negligent in the company to use the other, in consequence of which, a delay occurred.¹¹⁷ Should the sender neglect to exercise the right of selecting the route, or if the route selected cannot for any cause transmit the message, and the company has unsuccessfully attempted to inform the sender of this fact, it should exercise ordinary judgment in selecting a route for the sender and promptly deliver the message to this line with the instruction to forward it on to its destination.¹¹⁸

§ 464. Same continued—result of bad selection—initial company—not liable.

The initial company, in the absence of any partnership arrangement, only represents the sender in the capacity of agent so far as to the selection of the connecting route over which the message must necessarily be sent in order to reach its destination. It must comply with the instructions of the sender, and it is not liable for errors made by the latter in the way of a bad selection. So, if the sender has selected a certain route, the initial company will not be liable for any delays in consequence of such selection. The initial company may know it to be a mistake of the sender in making the selection, but it is under no duty to adopt another route when it knows, at the time of sending, that the selected route is not opened.¹¹⁹

§ 465. Same continued—exact extra fee or charges.

When the sender has selected the route, this necessarily puts the company to some additional expense, and increases their duties to the

¹¹⁷ West. U. Tel. Co. v. Turner, 94 Tex. 304, 60 S. W. 432.

¹¹⁹ West. U. Tel. Co. v. Simms, 30 Tex. Civ. App. 32, 69 S. W. 464.

¹¹⁸ Mitchell v. West. U. Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016.

extent that the wishes of the sender must be carried out; and, while the expense and additional liability of the company have been slightly increased, yet it seems but right that they may require of the sender a small additional charge to cover this.¹²⁰ One of the additional expenses incurred in the transmission of such messages is, that the name or names of the connecting lines must be transmitted along with the message, and this of course creates an extra trouble and expense.

§ 466. Liability of companies between themselves—actions.

As said before, connecting companies may be liable to third persons as partners, when, as between themselves, they are not partners, and any private arrangement made between themselves may bind them without affecting their liability toward third persons. The sender may institute suit, either against the initial company whose liability extends beyond its own terminus, or he may sue the connecting company guilty of the default; but, as between the companies, the general rule is that each is liable for its own negligence or breach of duty. And while the initial company may have assumed the responsibility for the transmission of the message beyond its own line, and damages may be recovered against it for the default of the connecting line, yet the company which actually caused the injury will be liable to the first for such damages.¹²¹ If the company guilty of the default is duly notified to come into court and defend an action against the initial line for such injury; or, it seems, if it is not expressly notified to defend but knows that it alone caused the injury and is liable, and is aware of the pendency of such a suit and its right to defend against the initial company for such injury, the judgment against the latter therein will be conclusive against the connecting line to the amount of damages recovered from the initial company.¹²² While a contract, made by the sender and the initial company to transmit a message over a certain connecting line, may be of benefit

¹²⁰ U. S. v. Northern Pac. R. Co., 120 Fed. 546.

¹²¹ Mo. Pac. R. Co. v. Twiss, 35 Neb. 267. 53 N. W. 76; Chicago, etc., R. Co. v. Northern, etc., Co., 70 Ill. 217; Ver-

mont, etc., R. Co. v. Fitchburg R. Co., 14 Allen (Mass.) 462.

¹²² Mo. Pac. R. Co. v. Twiss, 35 Neb. 267. 53 N. W. 76. See, also, Elliott on Roads and Streets, 656, 657.

to the latter, yet it is not a contract for its benefit in such a sense as will give the connecting company a right of action against the initial company for violating the contract, by delivering the message to another connecting line.¹²³

¹²³ St. Louis, etc., R. Co. v. Mo. Pac.
R. Co., 35 Mo. App. 272.

CHAPTER XIX.

ACTIONS FOR DAMAGES RESULTING FROM NEGLIGENT DELAYS OF TRANSMISSIONS.

- § 467. Parties—sender—in general.
- 468. Same continued—sender—action in tort or contract.
- 469. Same continued—message—sent by agent.
- 470. Addressee—right of action—in general.
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- 481. Agent for addressee.
- 482. Right under statute.
- 483. Right of action—altered message.
- 484. Sender paying charges—effect upon the addressee's right.
- 485. Third party—right of action.
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- 487. Addressee's right not affected—by failure to have message repeated.
- 488. Actions between sender and addressee.
- 489. Contract made where last act of assent was done.
- 490. Same continued—actions between sender and addressee—contract—where made.
- 491. Same continued—action where brought.

§ 467. Parties—sender—in general.

After having discussed, at some length, the liabilities of telegraph companies for losses occurring in negligently transmitting or delivering messages, we shall now discuss actions growing out of such negligence. In discussing this subject we shall first take up the rights of certain persons to sue, and then the nature of the action. In commenting on the last subdivision of this subject, we shall consider the rights of the sender to sue. The sender of a message may always maintain an action against a telegraph company to recover damages

resulting from a negligent transmission or delay of the message,¹ but the questions with which the courts have been confronted are, What is the nature of the action to be maintained, and who is the rightful person to be considered as the sender?² In many instances the rightful sender is represented in making the contract by an agent. Should the undisclosed principal in the contract bring the action, or is it the duty of the agent who sends the message?

§ 468. Same continued—sender—action in tort or contract.

It has been held that a telegraph company was the agent of both the sender and sender,³ and that either could maintain an action against it for its negligence. The prevailing view, however, is, that it is not an agent for either of these parties, but is an independent principal, and one of a public nature.⁴ They are institutions incorporated to perform public functions, and in discharging these, they must exercise reasonable and ordinary care and diligence; for a failure to do so, they will be liable in damages to the party thereby injured.⁵ So, if a party contracts with one of these companies to transmit a message to a certain place, and it fails to exercise care in the transmission, whereby the sender suffers loss, he may recover damages for such loss.⁶ It has been held by some courts that, when a contract was made with one of these companies to send a message and it negligently transmitted or delayed in delivering the message, the company was guilty of a breach of contract and the sender's action should be in contract. But the weight of authority is that the sender may maintain an action for the breach of the contract, or he may proceed against the company for the breach of its public duty or sue in tort.⁷ We are inclined to think that the latter view is the correct one.

¹ *Playford v. United Kingdom, etc.*, Tel. Co., L. R. 4 A. B. 706, 10 B. & S. 759.

² *West. U. Tel. Co. v. Brown*, 108 Ind. 538; *West. U. Tel. Co. v. Kinney*, 106 Ind. 468.

³ *N. Y. & W. Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338.

⁴ *Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 5 So. 397, 3 L. R. A. 71.

14 Am. St. Rep. 556. See, also, Chapter on Contracts made by telegraph companies.

⁵ *Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 3 L. R. A. 71, 14 Am. St. Rep. 556, 5 So. 397.

⁶ *Gray v. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301n.

⁷ *Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 18 So. 425, 30 L. R. A.

§ 469. Same continued—message—sent by agent.

The most difficult question which has come up in reviewing this subject is, Who should maintain the suit when the message is sent for an undisclosed principle? It has been generally held by most of the courts that the agent cannot maintain the suit unless he is interested in the contract, but that it is the duty of the principal to bring the action. The person who sends the message, or the person with whom the contract was made, is the proper party to recover damages for its breach; and he may recover in his own name, although the message was signed by another person as his agent.⁸ The principal is entitled to all the advantages and benefits of the contract made by his agent; and the fact that the company only contracted with the agent, and had no knowledge that the plaintiff was in fact the principal, is immaterial, except that it might set up as a defense any matter occurring prior to the disclosure of the principal and which would constitute a defense in a suit by the agent.⁹ The principal may sue upon a contract made by his agent without giving notice of his interest, although the other party supposed the agent was acting solely for himself.¹⁰ So, a telegraph company need not be informed that the sender of a telegram is acting as the agent for another, where it is not shown that the company would have acted differently had it known of the agency of the sender.¹¹ But where one party writes a dispatch

444, 48 Am. St. Rep. 604; Francis v. West. U. Tel. Co., 58 Minn. 252, 49 Am. St. Rep. 507, 59 N. W. 1078, 25 L. R. A. 406; McPeck v. West. U. Tel. Co., 107 Iowa 362, 10 Am. St. Rep. 205, 78 N. W. 63, 43 L. R. A. 214. See, also, Brown v. Chicago, etc., R. Co., 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911. In this case the court said: "All these matters are a breach of contract to carry the passenger safely, yet the carrier is held liable in an action for tort, . . . All the cases hold that the person injured through the negligence or carelessness of the carrier may proceed either upon the contract, alleging the negligent act of the defendant as a breach of the contract, or he may proceed in tort,

making the negligence of the company the ground of his right of recovery."

⁸ Young v. West. U. Tel. Co., 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669n; Thompson v. West. U. Tel. Co., 107 N. C. 449, 12 S. E. 427; Dougherty v. American U. Tel. Co., 75 Ala. 168, 51 Am. Rep. 435.

⁹ Harkness v. West. U. Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672.

¹⁰ Foster v. Smith, 2 Colwell (Tenn.) 474, 88 Am. Dec. 604; Shapp v. Jones, 18 Ind. 314, 81 Am. Dec. 359.

¹¹ West. U. Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843.

and gives it to another to send, who, instead of sending it, writes another and signs and sends it without notifying the company that it is sent on behalf of the first party, the latter cannot hold the company liable in damages for losses sustained through failure of delivery.¹² There are some instances where the agent may sue in his own name for the breach of a contract made by him for the principal; as where he is interested in the contract to the extent of his commission, or by reason of a special property in the subject-matter.¹³ So, a broker may sue a telegraph company in his own name for a breach of contract to transmit an order in his name, in behalf of his principal, for the purchase of gold. In such a case, however, he sues and recovers as trustee for his principal.¹⁴

§ 470. Addressee—right of action—in general.

One of the most difficult questions with which the courts and text-writers have been confronted, and one which has not been settled with any degree of harmony, is, The rights of addressees to maintain suits against telegraph companies for negligently transmitting or delivering a message, or for delivering a forged or fraudulent message, and also the nature of the action to be brought. There are two general rules upon which the rights of the addressee have been based. They are known as the English Rule and the American Rule. Some of our courts, seemingly becoming confused, have to a certain extent followed both of these rules; and for this reason their decisions are not at all in harmony, nor very clear in their reasons. We shall attempt, in a few of the following pages of this work, to describe these rules and the grounds on which each is based, where each has been followed, and if possible, harmonize the various holdings of the courts.

§ 471. Same continued—grounds on which rules are based.

Before entering into the discussion of either of these rules, it is necessary to discuss the grounds upon which each is based. The gen-

¹² *Elliott v. West*, U. Tel. Co., 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872.

Benedict, 5 Gray (Mass.) 561, 66 Am. Dec. 384.

¹³ *Goodman v. Walker*, 30 Ala. 482. 68 Am. Dec. 134; *Eastern R. Co. v.*

United States Tel. Co. v. Gilderleeve, 29 Md. 232, 96 Am. Dec. 519.

eral rule recognized everywhere, subject to certain exceptions in some jurisdictions, is, that a contract cannot confer rights on a person who is not a party to it, and accordingly no one can sue for a breach of a contract who is not such party, or who does not derive rights from an original party thereto. This rule is recognized in England almost to its full extent, subject to the exception that if the promisor of the contract stands in the relation of trustee to a third person, the latter may sue in equity. On the other hand, exceptions are made in the United States to contracts which confer a benefit on third persons. In these courts it is generally held that a third person benefited by such contract may sue in law on such contract. These, then, are the grounds upon which these rules have been founded. It is worthy of notice, however, that the early English cases, upon which the American doctrine was founded, have in England, been overruled by later decisions, so that they are not at present authority upon the question in that country.

§ 472. English rule—in general.

In England, the rule is that a third person cannot sue upon a promise for his benefit where he is a stranger both to the promise and the consideration.¹⁵ In some of the early cases decided in that country, it was held that if the third person had an interest in such contract, and stood in a close relation to the party from whom the consideration proceeded, he might be considered a party to the contract and could, therefore, maintain an action thereon.¹⁶ This latter view is no longer the law in that country. The court overruling this, said: "The modern cases show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the

¹⁵ 1 Strange 592; Price v. Easton, 4 Barn & Adol. 433.

¹⁶ Dutton v. Poole, 2 Lev. 210. In this case, a son promised his father to pay one thousand pounds to his sister, in consideration of the father's forbearing to sell a certain wood, which the father intended doing to raise a portion for his daughter. It was held

that the daughter might sue upon his promise for her benefit, since "there were such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and the promise to the father may well extend to the children."

purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued."¹⁷ As said, the English rule recognizes one exception to this general rule. If the contract, although in form with the promisor, is intended to secure some benefit to the third person, so that the latter is entitled to say that he has a beneficial right as a *cestui que trust* under the contract, then the third person may in equity enforce the contract.¹⁸ It is a question of interpretation as to whether an enforceable trust has been created.¹⁹ It was held, in deciding the enforceability of such trusts, that where a mere agreement was made between two parties, whereby one was to pay a third person this gave the latter no right of action against the party promising to pay.²⁰

§ 473. Rule applicable to telegraph companies.

Following the trend of this rule, the general rule in England with respect to contracts made with telegraph companies is, that the right of action for negligently transmitting or delaying a message is founded upon the contract of sending made between the sender as one party to the contract, and the telegraph company as the other; and the addressee, not being a party to the contract, cannot sue.²¹ In cases tried in that country on this subject, it seems that the plaintiffs carried on a business as merchants at Valparaiso, and were a branch house of a firm at Liverpool. A telegraph company, through the negligence of its agent, misdelivered a telegraphic message to the plaintiffs. The message purported to be from the plaintiffs' Liverpool house, and to be a large order for barley, but in fact it was not from the Liverpool house nor intended for the plaintiffs. The plaintiffs executed the supposed order and, having suffered a heavy loss in consequence, claimed damages against the company. The court held in this case that they were not entitled to maintain this action, as there was no contract between them and the company.²² It was intimated in this case that if there was any fraud perpetrated on the part of

¹⁷ Tweddle v. Atkinson, 1 Des. & S. 393.

¹⁸ Gaudy v. Gaudy, 30 Ch. Div. 57.

¹⁹ Murray v. Flavell, 2 Ch. Div. 89.

²⁰ Gaudy v. Gaudy, 30 Ch. Div. 57.

²¹ Playford v. United Kingdom, etc., Tel. Co., 10 B. & S. 759, L. R. 4 Q. B. 706; Dixon v. Renter's Tel. Co., 2 C. P. Div. 62; 19 Moak's Rep. 313.

²² See last case cited in note 21.

the company, the receiver might sue. If the sender, however, is acting as agent for the addressee, the latter may sue, since the contract of sending was made for his benefit, or, rather, it was made for him by his agent.²³

§ 474. American rule—in general.

As was said before, the decisions in the United States followed those early English cases which have long since, in that country, been overruled and are no longer authority in their courts. The English rule, with respect to contracts of private individuals, is recognized in but few of the United States, and in some of these exceptions have been grafted upon it.²⁴ The American rule is that a third party has a right of action upon a promise made for his benefit, although he is a stranger both to the promise and to the consideration. It has been held that, in order to make this rule binding, there must be two conditional elements in the contract: First, there must be an intent to benefit the third party; and, second, the promisee must owe some obligation to the third party.²⁵ If both of these elements do not exist, the third party has no right of action upon the contract. The cases are numerous in holding that an incidental or indirect benefit to a third party is not sufficient to give a right of action to him. There must be an intent on the part of the contracting parties that the third party shall be benefited.²⁶ Under these holdings, it is not necessary

²³ *Playford v. United Kingdom, etc.*, Tel. Co., 10 B. & S. 759, L. R. 4 Q. B. 706.

²⁴ The states recognizing the English rule in some form are Georgia, Massachusetts, Michigan, New Hampshire, North Carolina, Vermont, Virginia and Wyoming.

²⁵ *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Townsend v. Rockham*, 143 N. Y. 516; *Coleman v. Hiler*, 85 Hun 547; *Embler v. Hartford Steam, etc., Ins. Co.*, 158 N. Y. 431, 44 L. R. A. 512.

²⁶ *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218; *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100;

Savings Bank v. Thornton, 112 Cal. 255, 44 Pac. 466; *Burton v. Larkin*, 36 Kan. 246, 18 Pac. 398, 59 Am. Rep. 541; *Paducah Lumber Co. v. Paducah, etc., Co.*, 89 Ky. 340, 12 S. W. 554, 7 L. R. A. 77, 25 Am. St. Rep. 536; *Howsmon v. Trenton, etc., Co.*, 119 Mo. 304, 23 L. R. A. 146n, 41 Am. St. Rep. 64; *Jefferson v. Arch*, 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257n, 39 Am. St. Rep. 618; *Cincinnati, etc., R. Co. v. Bank*, 54 Ohio St. 60, 31 L. R. A. 653, 42 N. E. 700, 56 Am. St. Rep. 700; *Brown v. Markland*, 16 Utah 360, 67 Am. St. Rep. 629, 52 Pac. 597.

that the third party to be benefited should be named; it must clearly appear, however, that he was intended to be benefited.²⁷ And it is held, in some jurisdictions, that there must be such an acceptance by the third party to the contract as will release the promisee from any obligations he may be under to the third party.²⁸ Where the third party sues upon these contracts, he will be subject to the equities that may exist between the original parties to the agreement.²⁹

§ 475. Same continued—with respect to telegraph companies.

The English rule with respect to private contracts, as stated, is followed to a certain extent in some of our courts, but with respect to contracts made with telegraph companies for transmission of messages, it has never been adopted or followed by any. It has always been held that, where a telegraph company has negligently transmitted or delayed delivering a message the receiver or addressee could maintain his action against the company when he could prove actual damages.³⁰ It is not even intimated, either in England or in the United States, but that the sender may maintain an action

²⁷ *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *Bristow v. Lane*, 21 Ill. 194; *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398.

²⁸ *Ramsdale v. Horton*, 3 Pa. St. 330; *Stone v. Justice*, 9 Phila. 22. It is not the general rule, however: *Ray v. Williams*, 112 Ill. 91, 54 Am. Rep. 209. The assent will be presumed: *Rogers v. Gasness*, 58 Mo. 589.

²⁹ *Dunning v. Learvitt*, 85 N. Y. 30, 39 Am. Rep. 617.

³⁰ *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *West. v. West. U. Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; *May v. West. U. Tel. Co.*, 112 Mass. 90; *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383; *West. U. Tel. Co. v. Allen*, 66 Miss. 549, 6 So. 461; *West. U. Tel. Co. v. Longwill* (N. M.), 10 Am. St. Rep. 699; *De Rutte v. New York, etc., Tel. Co.*, 1 Daly 547, 30 How. Pr. 403;

Wolfskehl v. West. U. Tel. Co., 46 Hun (N. Y.) 542; *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403; *Young v. West. U. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669n, 22 Am. St. Rep. 883; *New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338; *Aiken v. West. U. Tel. Co.*, 5 S. C. 358; *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *West. U. Tel. Co. v. Beringer*, 84 Tex. 38, 19 S. W. 336; *West. U. Tel. Co. v. Jones*, 81 Tex. 271; *Martin v. West. U. Tel. Co.*, 1 Tex. Civ. App. 143, 20 S. W. 860; *Abraham v. West. U. Tel. Co.*, 11 Sow. (U. S.) 28. The rule in Canadian courts is the same, and the receiver is allowed to recover. *Watson v. Montreal Tel. Co.*, 5 Mont. Leg. News 87; *Bell v. Dominion Tel. Co.*, 3 Mont. Leg. News 406, 25 L. C. J. 248.

against a telegraph company for a breach of the contract of sending; and it has been held, in our courts, that these companies are as much responsible for their negligence to a person to whom a message is addressed as they are to the sender.³¹ While there is no dispute among the courts as to the rights of the addressee to sue, yet the question which has puzzled the courts the most is as to the nature of the suit to be brought, whether he should sue in contract or in tort. The courts have stated various grounds on this doctrine, and we shall now proceed to give some of them.

§ 476. Addressee beneficial party.

One ground upon which the courts hold that the addressee may maintain a suit against a telegraph company for its negligence in the transmission of a message is, that, where a contract is made by two parties for the benefit of a third person, the latter may sue for a breach of the contract. As may be observed, this reason is founded on the early English cases.³² The addressee is the beneficiary of such contract and is entitled to sue in his own right for damages, when by the negligence of the company he is deprived of the benefit he would otherwise have derived.³³ It seems that it is not necessary

³¹ *Young v. West. U. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 669n, 22 Am. St. Rep. 883; *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *Elwood v. West. U. Tel. Co.*, 45 N. Y. 549, 6 Am. St. Rep. 140; *Ellis v. Tel. Co.*, 13 Allen 227; *New York, etc., Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338; *Markel v. West. U. Tel. Co.*, 19 Mo. App. 80. In the first case cited, the court by Clark, J., said: "The following may be summed up as the reasons assigned therefor: 1. That a telegraph company is a public agency, and responsible, as such, to anyone injured by its negligence, or, at least, it is the common agent of sender and receiver, and responsible to each for any injury sustained by them respectively, by its

negligence: 2. That in a case like this, the receiver is the beneficiary of the contract, and the injury, if any, caused by the company's negligence must be to him; 3. The message is the property of the party addressed, in an analogy to a consignee of goods; That upon the face of the message, such as this, the sender is the agent of the receiver, and the latter, as the principal, can maintain an action for breach of the contract, or for a tort, if the injury is done him by negligence in performance of the duty contracted for." The following was the message in this case: "To J. T. Young, Newbern, N. C. Come in haste; your wife is at the point of death. J. W. Rice."

³² See § 471.

³³ *Aiken v. West. U. Tel. Co.*, 5 S. Car. 371; *West. U. Tel. Co. v. Hope*,

that the addressee should have known of the contract at the time it was made. Thus, it has been held that the husband of the addressee may sue for a breach of a contract made with the company by a party who has not been previously appointed her agent for that particular purpose;³⁴ although, some courts have held that the company must have had knowledge that the sender was the agent of the addressee.³⁵ Some courts hold that the company must have some notice of the importance of the message and the benefit which the addressee is likely to derive therefrom.³⁶ It is sufficient, however, if the benefit to be derived appear on the face of the telegram.³⁷

§ 477. Same continued—sender agent of addressee.

This rule, we think, is particularly applicable when the sender acts as agent for the addressee in making the contract.³⁸ As was said, by Reyer, C. J., in deciding this point: "The rule that a principle is entitled to maintain an action upon a contract made by his agent with a third person, although the agency is not disclosed at the time of making the contract, has many illustrations in the reported cases,

11 Ill. App. 291; *West. U. Tel. Co. v. Jones*, 81 Tex. 271. "A person for whose benefit a promise to another upon a sufficient consideration is made, may maintain an action on the contract in his own name against the promisor." *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541; *Hendrick v. Lindsey*, 93 U. S. 143. This doctrine is denied by the case of *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109, and also by *Gray on Tel.*, § 67.

In *West v. West. U. Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530, a son for the benefit of his father, left with the company a message addressed to his father with instructions to forward it immediately, at the same time paying the fee. Subsequently the father returned to the son the amount paid, and fully ratified his act. It was held that the contract

was made for the benefit of the father, and that he was entitled to sue for damages for the failure to deliver.

³⁴ *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920.

³⁵ *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23.

³⁶ *West. U. Tel. Co. v. Boesseche*, 72 Tex. 654, 13 Am. St. Rep. 843; *West. U. Tel. Co. v. Coffin*, 88 Tex. 94; *Butner v. West. U. Tel. Co.*, 2 Okla. 234, 37 Pac. 1087.

³⁷ *Martin v. West. U. Tel. Co.*, 1 Tex. Civ. App. 143, 20 S. W. 860.

³⁸ *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403, 1 L. R. A. 281; *De Rutt v. New York, etc., Tel. Co.*, 1 Daly (N. Y.) 547, 30 How. Pr. 403. See also, *Kennon v. West. U. Tel. Co.*, 92 Ala. 399, 9 So. 200.

and is elementary law."³⁹ This principle has been frequently applied in actions against telegraph companies, and is now the settled law of this country with respect to such corporations.⁴⁰ While the addressee may sue the company, there is no reason why the agent may not maintain the action in behalf of the addressee.⁴¹

§ 478. Action for breach of public duty.

There are other authorities which base the addressee's right of action upon the breach of the company's public duty.⁴² While we think this is the correct view to take of the subject, yet we do not mean to say that they may not sue for the breach of the contract. These companies have undertaken to perform public functions, and, among these, it is presumed that they have assumed the duty to transmit correctly and accurately and deliver promptly all messages entrusted to them; and on a failure to discharge these duties with due care and diligence, they will become liable to anyone who suffers damages thereby. People seldom resort to them for an employment of their services unless their business is of such importance that it must be attended to in the shortest possible time and in the most accurate and correct manner.⁴³ They have held themselves out to the

³⁹ *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403, 1 L. R. A. 281.

⁴⁰ *De Rutt v. New York, etc., Tel. Co.*, 1 Daly (N. Y.) 547, 30 How. Pr. 403.

⁴¹ *United States Tel. Co. v. Gildersleeve*, 29 Md. 332, 96 Am. Dec. 519; *American U. Tel. Co. v. Dougherty*, 89 Ala. 191, 7 So. 660; *Dougherty v. American U. Tel. Co.*, 75 Ala. 168, 57 Am. Rep. 435.

⁴² *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; 3 Suth. on Dam. 314; *West. U. Tel. Co. v. Longwill*, 10 Am. St. Rep. 699; *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403, 1 L. R. A. 281; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *Abraham v. West. U. Tel. Co.*, 11 Sawy. (U. S.) 28. See, also, *Young v. West. U. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044,

9 L. R. A. 669n; *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 344, 16 Am. St. Rep. 920; *West. U. Tel. Co. v. Reynolds*, 75 Va. 173, 46 Am. Rep. 715; *West. U. Tel. Co. v. Allen*, 66 Miss. 549, 6 So. 461; *Cowan v. West. U. Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545.

⁴³ Mr. Bigelow suggests as a satisfactory ground for the American rule, the fact that telegraphic communication is usually resorted to only in matters of importance, from which the company ought to infer the necessity of correct and prompt transmission, and that "a mistake in its transmission will be likely to produce damage to the receiver by causing him to do what he would otherwise not do. Knowing, then, the probable conse-

public as ready and willing to accomplish such business, and when they are compensated for their undertaking, but fail in the attempt, they, and not their employer, should suffer for the negligence of the former. In other words, when they have failed to discharge their public duties in transmitting messages, whereby the addressee has been caused to suffer, the latter should have the right to maintain an action against the company for the breach of its public duty. The damages, however, which result from such breach should be the proximate consequence of the company's negligence.

§ 479. Same continued—action in contract or tort.

It is often a question with the addressee as to whether he should bring an action in contract or in tort, and it is sometimes a doubtful question with the courts as to what kind of an action has been brought. Because the addressee has an action in contract is no reason why he may not sue in tort. As was said: "In many cases an action as for tort, or an action as for breach of contract, may be brought by the same party on the same state of facts;"⁴⁴ and, as further stated by another text-writer: "The fact that a contract existed, and was broken at the same time, and by the same act or omission, by which the plaintiff's cause of action arose, is only one of the incidents of the situation. The defendant owed, in respect of the same thing, two distinct duties, one of special character to the party with whom he contracted, and one of a general character to others. . . . The duty, therefore, does not grow out of the contract, but exists before and independent of it."⁴⁵ These companies are engaged in a public

quence of transmitting an erroneous message, they owe a duty to the receiver of refraining from such acts; and if (by negligence) they violate this duty, they must, on plain legal principles, be liable for the damage produced." Bigelow on Torts, 602. See, also, *Coit v. West. U. Tel. Co.*, 130 Cal. 657, 53 L. R. A. 678, 80 Am. St. Rep. 153, 63 Pac. 83; *West. U. Tel. Co. v. Lyman*, 60 Ill. App. 124; *Webbe v. West. U. Tel. Co.*, 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *Mentzia v. West. U. Tel. Co.*, 93 Iowa 572,

57 Am. St. Rep. 294, 62 N. W. 1; *Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 3 L. R. A. 71, 14 Am. St. Rep. 556, 5 So. 397; *Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 30 L. R. A. 444, 48 Am. St. Rep. 604, 18 So. 425; *Tobin v. West. U. Tel. Co.*, 146 Pa. St. 375, 28 Am. St. Rep. 802, 23 Atl. 324; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 4 L. R. A. 660, 10 Am. St. Rep. 699, 11 S. W. 783; *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574.

⁴⁴ Cooley on Torts, 103, 104.

⁴⁵ Bigelow on Torts, 586-617.

employment and are, within certain limits, to be considered as common carriers. As such, they are charged with a common-law duty, and "actions may be brought in tort, although the breach of duty is the doing or not doing of something contrary to an agreement made in the course of such employment."⁴⁶ Almost all cases on this subject hold that the addressee, who is injured through the negligence or carelessness of the company, may proceed either upon contract, alleging the negligent act of the defendant as a breach of the contract, or he may proceed in tort, making the negligence of the company the ground of his right of recovery.⁴⁷

§ 480. Same continued—damages under either.

The reason why this question should be considered and known is, that the amount of damages to be recovered, and the ground upon which it is allowed under each, is quite different. The general rule as to the amount of damages to be recovered for a breach of contract is, that none can be recovered save that which may reasonably be supposed to have been contemplated by the parties at the time the contract was made, as the probable result of the breach of the contract.⁴⁸ Recovery in tort is not thus limited. The rule applicable to such cases is, that a "party who commits a trespass, or other wrongful act, is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done."⁴⁹ This subject is most often brought up where the addressee is suing to recover damages for mental suffering. If the action is in contract, it is pretty generally held that the addressee cannot recover damages for mental suffering, since it is presumed that this was not in the contemplation of the parties as a probable result of the breach of the contract; yet, if the action were in

⁴⁶ *Southern Ex. Co. v. McVeigh*, 20 Gratt. 264; *McPeck v. West. U. Tel. Co.*, 107 Iowa 362, 70 Am. St. Rep. 205, 78 N. W. 63, 43 L. R. A. 214; *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356.

⁴⁷ *Id.*

⁴⁸ *Cowan v. West. U. Tel. Co.*, 122

Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 274, 64 L. R. A. 545.

⁴⁹ *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356; *Keenan v. Cananaugh*, 44 Vt. 268; *Metallie, etc., Co. v. Fitchburg R. Co.*, 109 Mass. 277, 12 Am. Rep. 689; *Hill v. Winson*, 118 Mass. 251; 1 Sedgwick on Dam., 130.

tort, recovery could be had.⁵⁰ So, it is of vital importance to know what kind of action should be brought, and, also, the nature of the action which has been brought.

§ 481. Agent for addressee.

It has been held, by some courts, that the company stands in the relation of an agent to the addressee and is, therefore, liable in damages to its principal for the consequence of its negligence.⁵¹ It was held, in one case, viewing the matter in this light, that it was reasonable for all purposes of liability, that the company should be regarded as much the agent of him who receives, as of him who sends the message, and it was considered that the company ought to be regarded as the common agent of the parties at either end of the wire.⁵² We think this is clearly an incorrect view to take of the subject. But as will be seen hereafter, the company is generally considered to be the agent of the sender, when it is not suggested by the addressee to be used as a medium of communication; but it may be sued by either for the negligent performance of its duty.

§ 482. Right under statute.

Other authorities claim that the right of the addressee to sue the company for negligently transmitting or delaying the delivery of a message, arises from statutes to that effect.⁵³ In some states there were statutes early adopted which gave the third party the right to maintain an action for a breach of a contract made for his benefit, although he may have been a stranger, both to the promise and the consideration.⁵⁴ In two states in particular, there have been statutes

⁵⁰ See chapter on Damages for mental suffering.

⁵¹ *New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Pa. St. 338.

⁵² *Id.*

⁵³ *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1.

⁵⁴ *Ellis v. Harrison*, 104 Mo. 270;

Rice v. Sovery, 22 Iowa 470; *Miliani v. Toguini*, 19 Nev. 133; *McArthur v. Dryden*, 6 N. Dak. 438.

Statutes allowing the real party in interest to sue have been passed in Alabama, California, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Texas, Utah and Wisconsin. Statutes specifically giving to a third party a right

adopted which are more specifically applicable to the negligence of telegraph companies.⁵⁵ It is often provided in these latter statutes that the right of the addressee is not affected by reason of the fact that the employees of the company may be proceeded against criminally for their negligence.⁵⁶ While these statutes have had a tendency to strengthen the general rule whereby a third person, in whose favor a contract has been made, may maintain an action for a breach therefor, yet we think that they are merely declaratory of the rights derived under the common law, and that a third person could as easily recover damages for the breach of the contract made in his behalf as if the statutes were not in existence.

§ 483. Right of action—altered message.

And still, it has been held in other jurisdictions that, where a telegraph company has delivered an altered message or one materially different from that contracted to be sent, it would be a misrepresentation, or a false message, and the company should be held liable for the consequences.⁵⁷ The ground upon which the right of action arises is the same as that for injuries resulting from other misrepresentations. Thus, it has been held that a physician, who negligently administered a wrong medicine, is responsible to his patient for the injury resulting therefrom, if he takes it in the belief that he was taking the right medicine.⁵⁸ And it has been suggested by analogy that a telegraph company must answer to an addressee for delivering to him a message which, through its negligence, has become false.⁵⁹ But in order for the addressee to recover, he must show that he himself has suffered an injury by the negligence of the company. Therefore, where a message from a dealer to his broker is erroneously trans-

of action upon a contract made for his benefit have been passed in California, Code, § 1659; and Dakota, Compt. Laws, § 3499.

⁵⁵ Tenn. Code., §§ 1541, 1542, Indiana Statute.

⁵⁶ Wadsworth v. West. U. Tel. Co., 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574; West. U. Tel. Co. v. Fenton, 52 Ind. 1.

⁵⁷ May v. West. U. Tel. Co., 112 Mass. 90.

⁵⁸ Norton v. Small, 106 Mass. 143, 8 Am. Rep. 298; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Ayers v. Russel, 3 N. Y. Supp. 338.

⁵⁹ Allen's Tel. Cas. 455; Gray on Tel., § 73.

mitted, by reason of which the broker makes losing contracts for his principal, the broker cannot maintain an action for damages, because, as he is not responsible on the contracts, he cannot claim to have suffered any damages.⁶⁰ The courts and text-writers, as may be observed, have considered various grounds upon which the addressee's rights of action have been based, but we are inclined to think, as said before, that his right of action, when on contract, is founded on the ground that a third party, in whose favor a contract is made, may sue for the breach thereof: and when the action is in tort, for the breach of the company's common-law duty.

§ 484. Sender paying charges—effect upon the addressee's right.

The fact that the sender paid the company the charges for transmitting the message, will not affect the addressee's right of action.⁶¹ If the sender is acting in the relation of agent to the addressee, in the particular instance; or, if the latter is the beneficiary of the contract of sending, the payment by the sender will be a sufficient payment for the addressee. If he should sue for the breach of its public duty, the payment by the sender in the contract of sending, and out of which the action of tort arose, would be sufficient for him to maintain an action thereon. It matters not from whom it derives the compensation for its services, because, having received the charges, it is presumed that the company has assumed the duty to correctly transmit and promptly deliver the message. In one case it was held that the receiver could maintain his suit although the charges had been paid by the sender, to whom they were afterwards returned by the company.⁶² The same rule will apply in actions brought by the sender when the message fees have been paid by the addressee.

§ 485. Third party—right of action.

It is not every one who may maintain suit against a telegraph company when interested in a message being correctly transmitted and

⁶⁰ *Rose v. United States Tel. Co.*, 6 Robt. (N. Y.) 305; 3 Abb. Pr. (N. Y.) 408, 34 How. Pr. (N. Y.) 308.

⁶¹ *Wolfskehl v. West. U. Tel. Co.*, 46 Hun (N. Y.) 542; *West. U. Tel.*

Co. v. Allen, 66 Miss. 549, 6 So. 461; *West. U. Tel. Co. v. Feebles*, 75 Tex. 527, 12 S. W. 860; *West. U. Tel. Co. v. Beringer*, 84 Tex. 38, 19 S. W. 336.

⁶² *West. U. Tel. Co. v. Beringer*, 84 Tex. 38, 19 S. W. 336.

promptly delivered, and who would suffer a loss by a failure of the company to properly discharge this duty. He must show that the company owed a duty to him in the particular instance. Therefore, a stranger cannot maintain an action against a telegraph company for its negligence in transmitting or delay in the delivery of a message, when the company is ignorant of his connection or interest in the message, or when he is remotely connected in the transaction. Thus, where the plaintiff delivers a message to a third person with the instruction to deliver it to the company for transmission, but instead of the third party obeying the instruction, he writes another message and prepares and delivers it to the company as his own, and of which act the company is ignorant, the latter will not be liable to the plaintiff for its negligence.⁶³ If the plaintiff can show that either the sender or the addressee, or both, were acting merely as his agents, the rule would be different. So, also, where the message is sent on behalf of a wife, the husband is the proper person to sue, although he may not have been a party to the contract of sending.⁶⁴ And the parent or next friend may sue a company for its negligence in transmitting or delivering a message in which the child is interested. In such cases the contributory negligence of the parent will be no defense to the company as against the child, while it may be as against the parent.⁶⁵

⁶³ *Elliott v. West. U. Tel. Co.*, 75 Tex. 18, 12 S. W. 954; *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183.

⁶⁴ The fact that the company had no notice that she was plaintiff's wife, or that the contract was made for her, is immaterial: *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920; *West. U. Tel. Co. v. Feegles*, 75 Tex. 537; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; *Young v. West. U. Tel. Co.*, 107 N. C. 370, 22 Am. St. Rep. 883, 9 L. R. A. 669n, 11 S. E. 1044.

⁶⁵ *West. U. Tel. Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048, 26 Am. St. Rep. 758. This case was an action by a father and son against the telegraph

company for failure to deliver a message sent to a physician. The son, a boy of fifteen years, had broken his arm and on the same day his mother, in his father's absence, telegraphed for a physician. Through the conceded negligence of the company the message was not delivered for nine days, but it appeared that the parents made no further efforts to secure a physician until it was too late to save the boy's arm. It was held that the father's contributory negligence in not sending for another physician would bar recovery on his own account, but that a judgment in favor of the son was proper, as the negligence of the father could not be imputed to him. See, also, *Williams v. Tex., etc., R. Co.*, 60 Tex. 205; *Galveston, etc., R. Co. v.*

§ 486. Under special statutes—penalty.

There are special statutes adopted in some of the states which impose a penalty on telegraph companies for every failure to properly discharge its duty as to transmitting and delivering messages, and providing that the penalty may be recovered by the "party aggrieved." It has been held in Mississippi,⁶⁶ Tennessee⁶⁷ and Missouri,⁶⁸ that either the sender or receiver could recover the penalty under these statutes. There is a statute somewhat similar to these in Indiana, but it is held there that only the sender has a right of action.⁶⁹ And, in the latter state it is held that one who directs his clerk to forward to him, in his absence, an expected message from a third person, is not a "sender" within the meaning of the statute;⁷⁰ nor is one a sender who merely shows that he delivered to the company a message for transmission, signed by another but paid for by himself.⁷¹ There is another statute in this state authorizing the recovery of special damages, under which the addressee may sue.⁷² There is a statute in New York which prescribes the duties of telegraph companies, and under this, a company may maintain an action against a connecting line which refuses to accept a message from the initial line for further transmission;⁷³ although, in such cases, the original sender of the message might properly have maintained the action.⁷⁴

§ 487. Addressee's right not affected—by failure to have message repeated.

In some jurisdictions it is held that the stipulations in the message blanks with respect to a necessity of a message being repeated in

Moore, 59 Tex. 64, 46 Am. Rep. 265; Plimley v. Birge, 124 Mass. 57, 26 Am. Rep. 645.

⁶⁶ West. U. Tel. Co. v. Allen, 66 Miss. 549, 6 So. 461.

⁶⁷ Wadsworth v. West. U. Tel. Co., 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574.

⁶⁸ Markel v. West. U. Tel. Co., 19 Mo. App. 80.

⁶⁹ West. U. Tel. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692; West. U. Tel. Co. v. Meek, 49 Ind. 53; West. U.

Tel. Co. v. Hopkins, 49 Ind. 223; Hadley v. West. U. Tel. Co., 115 Ind. 191.

⁷⁰ West. U. Tel. Co. v. Kenney, 106 Ind. 468.

⁷¹ West. U. Tel. Co. v. Brown, 108 Ind. 538.

⁷² West. U. Tel. Co. v. McKibben, 114 Ind. 511; West. U. Tel. Co. v. Fenton, 52 Ind. 1.

⁷³ United States Tel. Co. v. West. U. Tel. Co., 56 Barb. 46.

⁷⁴ Leonard v. New York, etc., Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

order to bind the company are binding; and, when this is the case, the addressee's right of action, when in tort, is not affected by these stipulations,⁷⁵ but if the action is in contract, we think the rule would be different. When he sues for the breach of the contract, made by the sender as his agent or in his behalf, he assumes all the conditions of the contract, and as they would be binding on the sender, they would also be binding on the addressee.

§ 488. Actions between sender and addressee.

It has been held that, as between the sender of a telegraph message and the innocent sendee, all losses caused by the errors or mistakes made in the transmission must be borne by the sender, but the latter may recover his loss from the company.⁷⁶ Thus, where a company erroneously transmits a message offering to sell merchandise at a certain price, so as to make the price less, the sender would be bound by the message as sent, but he could recover the difference from the company.⁷⁷ The reason of this rule is, that the company has no authority or agency either from the sender or addressee to make, modify, or alter any agreement or proposition contained in the message to buy or sell, or to bind a person sending or receiving it.⁷⁸ Hence, the mere fact of employing the company to send a message

⁷⁵ *New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Tobin v. West. U. Tel. Co.*, 146 Pa. St. 375, 28 Am. St. Rep. 802, 20 Atl. 324.

⁷⁶ *Ayer v. West. U. Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495.

⁷⁷ *West. U. Tel. Co. v. Flint River, etc., Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 39.

The company in accepting a message is under obligation to transmit it correctly: *West. U. Tel. Co. v. Chamblee*, 122 Ala. 428, 82 Am. St. Rep. 89, 25 So. 232. If a land agent leaves a message directed to his principal and naming the price at which his property can be sold, and the company through error in the transmission

raises the price, and the principal accepts the offer as received and executes a deed at that price first named by him, the company is liable to the vendor for the difference between the prices: *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609, 37 S. W. 904. See, also, *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa 160, 70 Am. St. 181, 77 N. W. 1034; *Rettenhouse v. Independent Line of Tel.*, 44 N. Y. 2263, 4 Am. Rep. 673; *West. U. Tel. Co. v. Beals*, 56 Neb. 415, 71 Am. St. Rep. 682, 76 N. W. 903.

⁷⁸ *Pegram v. West. U. Tel. Co.*, 100 N. C. 28, 6 Am. St. Rep. 557.

does not make it the agent of the sender so as to bind him upon a telegram negligently altered in transmission. The sender is bound by the contents of the telegram as received, only so far as it is a faithful reproduction of what is sent.⁷⁹ The negligence of the company in delivering a changed message cannot be attributed to the addressee, who acts upon its direction, when there is nothing in the message as received to suggest a doubt as to its accuracy.⁸⁰

§ 489. Contract made where last act of assent was done.

A contract is complete where nothing further remains to be done to give either party a right to have it carried into effect.⁸¹ Therefore, where the parties are residents of different states, the state where the final assent is given or the last act necessary to complete it is done is the place where the contract is made, notwithstanding all preliminary arrangements were made in the other state.⁸² It has been stated that "the general rule of law is, that a contract takes effect, as such, at the place where it was intended to be delivered and become operative, and the liability of the parties is determined by the law of that place."⁸³ So, where a person in one state writes to a person in another a letter containing an offer or proposal, and the latter writes in reply a letter accepting the proposal, the contract is complete when the letter of assent is deposited in the post office, properly addressed.⁸⁴ The place of the contract is the place where the letter of acceptance is mailed, and not the place where the letter is received.⁸⁵

§ 490. Same continued—actions between sender and addressee—contract—where made.

The place of final assent generally determines the place where a contract is made, when it consists of letters or telegrams passing be-

⁷⁹ *Pepper v. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660.

⁸⁰ *West. U. Tel. Co. v. Edsall*, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835.

⁸¹ *Maetier v. Frith*, 6 Wend. 103; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339.

⁸² *Whiston v. Stodder*, 8 Mart. 95.

12 Am. Dec. 281; *Milliken v. Pratt*, 125 Mass. 375; *Ames v. McKamber*, 124 Mass. 85.

⁸³ *Lee v. Selleck*, 33 N. Y. 615; *Fielden v. Blair*, 21 Wall. 246.

⁸⁴ *Maetier v. Frith*, 6 Wend. 103; *Adams v. Lindsell*, 1 Barn. & Ald. 681.

⁸⁵ *Vassar v. Camp*, 14 Barb. 341; *Clark v. Dales*, 20 Id. 42; *Bell v. Packard*, 69 Me. 105.

tween parties living in different places or countries. When a telegram is sent accepting a proposition, received by mail or telegram, the contract thus consummated is deemed to have been made at the time when and the place where the last act of assent was thus done or made; and the contract is, therefore, binding, though as a matter of fact, the telegram is not received by the person to whom it was addressed.⁸⁶ The parties to a contract made by means of telegrams are bound by the laws of the state in which the contract was made, although the suit may have been brought in another state. They may, however, agree by contract or stipulation to be governed by the laws of a state other than that in which the contract was made.⁸⁷

§ 491. Same continued—action where brought.

The place where suit should be brought depends upon the question as to whether the action is local or transitory; and the difficulty is to determine what are local and what are transitory actions.⁸⁸ If the contract between the sender and the addressee concerns local matter, the suit must be brought in the place where the property is located;⁸⁹ but if it is about transitory matter, it should be maintained in the place where the defendant can be found. Where the company has been guilty of negligence in the transaction of its business, actions brought to recover damages arising therefrom are personal and transitory and may be brought wherever the defendant can be found, but if the action is brought to recover a statutory penalty, it must be instituted in the state in which the statute is in force.

⁸⁶ *Dard v. Bounaffee*, 6 La. Ann. 563, 54 Am. Dec. 573; *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; *Vassar v. Camp*, 11 N. Y. 441; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Perry v. Mt. Hope Ins. Co.*, 15 R. I. 380, 2 Am. St. Rep. 902.

⁸⁷ *Griesemer v. Mut., etc., Assn.*, 10 Wash. 202; *Pennsylvania, etc., Ins. Co. v. Mechanic's, etc., Co.*, 72 Fed. 413, 73 Fed. 653.

⁸⁸ Perhaps the best distinction to be found between local and transitory actions is, that "If the cause of action is one that might have arisen any-

where, then it is transitory; but if it could only have arisen in one place, then it is local; and for the most part, actions which are local are those brought for the recovery of real estate or for injuries thereto, or for easement;" *Cooley on Torts* (2 Ed.), 451. See, also, *Mason v. Warner*, 31 Mo. 508; *White v. Sanborn*, 6 N. H. 222; *Morris v. Missouri Pac. R. Co.*, 78 Tex. 17, 9 L. R. A. 349, 22 Am. St. Rep. 17; *Little v. Chicago, etc., R. Co.*, 65 Minn. 48, 60 Am. St. Rep. 421, 33 L. R. A. 423, 67 N. W. 846.

⁸⁹ *Id.*

CHAPTER XX.

MATTERS OF PLEADING, PRACTICE AND EVIDENCE— GENERALLY.

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§ 492. Scope of chapter.

In this chapter we desire to discuss pleading, practice and procedure, generally, which has been found to be of use and importance in litigations against telegraph and telephone companies. This is a treatise upon substantive law rather than upon procedure, and we shall not therefore undertake to discuss, at any great length, the subject of pleading and practice. The subject has been most fully and ably discussed by other text-writers while writing particularly upon that subject, and we shall only refer to these works. We shall here consider merely such additional matters on this subject as most frequently arise, and are of practical use in telegraphic litigations.

§ 493. Character of action.

We have discussed in a previous chapter the character or nature of actions brought against telegraph companies, so we shall only supplement what has already been said. The character or nature of an action against these companies is properly one *ex contractu*, and is based upon the contract of sending, although it differs in some degree from ordinary actions for breach of contract, owing to the public character of the company. There are few, if any, cases directly adjudicating this subject, but it seems that the actions are analogous to that of actions against carriers of passengers. In such cases, the action is in tort for the breach of public duty created by the contract of carriage. There is authority¹—and we think correctly given—which holds that the addressee, when he does not stand in privity to the contract of sending, must sue in tort; but underlying this is a breach of a contract, out of which grows the breach of the company's public duty. While the addressee's action may be in tort, yet if it had not been that the company was guilty of a breach of the contract of sending, it would not be liable in an action in tort. The reason why the nature of the action should be considered, as said elsewhere,² is that the measure of damages is different in the two actions. Another reason is, that the statute of limitation may run against a suit in one and not in the other. For instance, there are statutes in most of the states which provide that all actions in tort against corporations for negligence, must be brought within a certain time after the commission of the negligent act. These statutes are not applicable to actions in contract brought against the same company.

§ 494. Same continued—distinction between an altered message, and one not sent or delivered.

It was held, in one case, that there was a distinction in the nature of an action to be brought by the addressee for a loss sustained by the company negligently delivering a changed or altered message, and an action for a failure to transmit or deliver the message. It was held, in the first of these cases, that the action sounded in tort, and is different from that where the sender sustains a loss for a non-delivery.³

¹ See chapter XIX.

² See chapter XIX.

³ West. U. Tel. Co. v. Richman

(Pa.), 8 Atl. 172. See, also, N. Y. etc., Tel. Print. Co. v. Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338.

This decision has not been followed by at least one court, and we think that the reasons upon which this holding is based, are unsound. It is the duty of the company to follow the exact words of the message, and it cannot transmit the message in words other than those contained therein, although the company may intend to convey the same thought. When it fails to perform this duty, the addressee or the sender may maintain an action for such breach to recover a loss sustained thereby. It would be the addressee's only remedy, where he was not a beneficiary to the contract of sending; and the sender may maintain his action for the breach of the contract or for the breach of its public duty. It is also one of the duties of these companies to transmit and deliver promptly all messages tendered it, and on a failure to do so, the company may be liable either in contract or in tort. So, we cannot see that there is any distinction in the two kinds of action.

§ 495. Action—by mandamus.

The public nature of the duties of telegraph and telephone companies is such that performance may, in some instances, be enforced by mandamus.⁴ Some of the duties of these companies are primarily a duty which they owe to the public, but there is a particular or specific right in every member of the public to enforce a performance of these duties. Thus, it seems that, if the company should refuse, without a legal excuse, to accept a message for transmission, it may be forced to do so by a writ of mandamus. While the injured party may have an action against the company arising in tort or contract for such refusal, yet in certain cases, we think, the company may be compelled to transmit the message by mandamus proceedings. So, also, if any of these companies should discriminate in their business against any members of the public, they may be forced by mandamus to discontinue such discrimination.⁵ Thus, if a telephone company should re-

⁴ *Gwynn v. Citizens' Tel. Co.*, 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819, and note; *Patwin Place v. Topeka R. Co.*, 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312, and note.

⁵ *State v. Citizens' Tel. Co.*, 61 S.

C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870; *Central U. Tel. Co. v. Falley*, 118 Ind. 194, 10 Am. St. Rep. 114; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 52 Am. Rep. 104. *Mandamus*, however, does not lie to compel the performance of an unlaw-

fuse to furnish its facilities to any one who offers to comply with the rules of the company, it could be forced to furnish such, by a writ of mandamus.⁶ It is true that mandamus is an extraordinary remedy and cannot be resorted to where ordinary remedy will afford complete relief, but in some cases the latter remedy will not afford ample and complete relief, and when such is the case, we think that the extraordinary remedy may be resorted to. We do not mean to be understood as saying that the sender of a message could, in every particular case, compel a company to transmit a message by mandamus, but if it continued to refuse to transmit any and all proper messages tendered it, the company could be compelled to perform this duty by mandamus. There may be instances, however, where it could be forced by mandamus to transmit even one message, but as a general rule the ordinary remedy should be resorted to in such cases.

§ 496. Action—injunction—specific performance.

In some cases the proper action to be brought against telegraph and telephone companies for failure to carry out their duties, is by injunction,⁷ or, by its complement, an action for specific performance. It is hardly necessary to discuss these actions, since there is nothing new in the procedure, in either of them, which is particularly applicable to these companies. But suffice it to say, that if they refuse to carry out any contract entered into between them and an individual, they may be compelled to do so by an action for specific performance of the contract; or, should either attempt to discontinue service to any person, such person would have a right to enjoin them from so doing. In other words, whenever an individual could enjoin another

ful act: *Godwin v. Tel. Co.*, 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941. In this case the company refused to furnish a bawdy-house with its facilities, and it was held that it could not be forced to do so by *mandamus*.

⁶ *Id.*

⁷ *Louisville Transf. Co. v. American Distc. Tel. Co. (Ky.)*, 24 Alb. L. J.

283. See, also, *Central Dist. Tel. Co. v. Com.*, 114 Pa. St. 592, 7 Atl. 926. And where the service is wrongfully discontinued, the subscriber is entitled to recover such damages as were the direct result of the wrong: *Cum. Tel., etc., Co. v. Hendon*, 71 S. W. 435, 24 Ky. L. Rep. 1271; *Malochee v. Great Southern Tel., etc., Co.*, 49 La. Ann. 1690.

person for doing or not doing a particular act, he may also enforce the same remedy against these companies.

§ 497. Service of process.

Before judgment can be legally entered against one of these companies for damages sustained for the breach of any of its duties, or before judgment can be rendered for any cause, the company must first have been summoned to come into court to plead, answer or demur to the pleadings of the plaintiff. We shall only briefly state the manner in which this process may be legally served, since there is no difference in the manner of service on these corporations to that practiced in cases where other similar corporations are concerned, and which may be found discussed at greater length in treatises on corporations in general. At common law, process against a corporation was by writ of summons against some one of its agents, and in case no appearances was made, then by a distringas against its goods; so, that if the corporation had neither land nor other property, there was no way to compel its appearance either at law or in equity.⁸ The manner of process upon corporations is now generally regulated by statutes in most all the states of the Union. So, we refer the reader to the statutes of his own state for a consideration of this subject. The statutes of most of the states are somewhat similar, and, as a general rule, they all provide for the service to be on some agent or employee of the company. Speaking more specifically of telegraph and telephone companies, a service upon one of their agents, operators or managers in the county through which their lines run, is sufficient for a suit brought in that county. If there is any doubt of the person being the company's agent, any facts which go to show that he is working for the company, such as receiving money for it while in an office over whose doors may be found the defendant's name, is of itself *prima facie* evidence that he is the employee of the company, and one on whom service may be made.⁹ These statutes generally provide that the service shall be made on certain officers or

⁸ 1 Minor's Inst. 565. 3 Black. Com. 447, 477; *McQueen v. Middleton Mfg. Co.*, 16 Johns. (N. Y.) 5; *Glaize v.*

South Carolina R. Co., 1 Strobb. 73.

⁹ *Thompson v. West. U. Tel. Co.*, 107 N. C. 449, 12 S. E. 427.

agents of the company, as the operator, agent, manager or some other employee of the company, and a summons on any other than one of these would not be sufficient.

§ 498. Pleadings in general.

The manner of pleading in the several states with respect to the time when the complaint, petition or declaration shall be filed with the clerk of the court in which the case is to come up, is not the same. In some states the first step to be taken in bringing a suit is the filing of the declaration, petition or complaint with the court, from which summons must then be served upon the defendant to the suit within a certain time of the return term; while in others the first step is the summoning of the defendant into court to answer, plead or demur to a certain charge. In the latter method of procedure, the declaration or complaint must be filed within a certain time before the return term. In either instance, the defendant must have time to examine the pleadings in order to meet the allegations contained therein. There is also a difference in the length of time provided for in the several states within which the pleadings must be filed with the clerk of the court. In most of the states the first term of the court after the filing of the case is the return term, and the next succeeding term is the trial term; yet in other states, Mississippi for instance, there are statutes which provide that, if the suit is brought thirty days before the first term, it shall be the trial term. These statutes are in states where the courts are few and the object is not to delay the trial of the cause too long before hearing.

§ 499. Same continued—nature of.

There is nothing peculiar about the pleadings in actions against telegraph companies for damages, since in such cases the recognized rules of pleading are applicable. The declaration or complaint of the plaintiff must, of course, allege the facts necessary to sustain the action. Thus, it must in some manner state that the company is a corporation and has a line of wires in the county in which the suit is brought. It should also aver that the message was delivered to the company for transmission, and that the charges were paid or tendered, although this is not essential. If the action is brought by the

addressee, in contract, he should aver in the declaration that the sender was acting as his agent in that particular instance.¹⁰ If the action is in contract, the contract of sending must be sufficiently pleaded;¹¹ and, if in tort, the allegation must show that the failure of the message to reach its destination promptly and correctly was caused by the negligence of the company in transmitting it.¹² The blank forms of these companies generally contain a stipulation to the effect that the messages shall be presented for transmission in writing, but it is not necessary for the declaration to aver this fact,¹³ because, when the company has accepted the message it is presumed that it has waived this right, or rather, it is estopped from claiming the right after the message has been accepted.

§ 500. Same continued—special statutes—amount of damages.

In some states there are statutes which provide that the plaintiff may recover statutory damages with special damages; and in a case where the claim is for both, the declaration is not necessarily demurrable for the reason that the former could not be recovered, because the negligent act was committed in another state.¹⁴ The amount and character of the damages should be set out in the declaration; that is, whether the damages claimed are actual or exemplary.¹⁵ Thus, a complaint alleging an error in the transmission of a telegram whereby the plaintiff was prevented from buying certain goods, asking a certain sum as special damages, without alleging any facts going to show such damages, will not sustain a judgment for more than nominal damages.¹⁶ It seems however, that if the claim is for general damages, the plaintiff may recover for mental suffering with other damages.¹⁷

¹⁰ *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23.

¹¹ *Id.*

¹² *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122.

¹³ *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23, 9 So. 414.

¹⁴ *Alexander v. West. U. Tel. Co.*, 67 Miss. 386, 7 So. 280.

¹⁵ *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715.

¹⁶ *Achenson v. West. U. Tel. Co.*, 96 Cal. 235, 31 Pac. 44.

¹⁷ *So Relle v. West. U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 305.

§ 501. Same continued—copy of telegram—part of pleading.

In most of the cases brought against telegraph companies to recover damages for the negligent transmission or delivery of a message, the message is written out in the declaration. This is usually done to better show that there was a contract made, and also to show that the company was informed by the face of the message of its importance. In furtherance of this proof, they often attach a copy of the telegram to the pleadings, and ask that it may be made a part thereof. When the request is made, it is generally held that all the reasonable stipulations contained in the blank become a part of the pleadings.¹⁸ We may say that all of the printed contracts in this form are made a part of the pleadings, but the company can take advantage only of those which are reasonable.

§ 502. Same continued—amendments liberally allowed.

The strictness with which the common-law rule regarded the pleadings brought against private persons and corporations has been greatly obviated by the liberal allowance of statutes in most of the states in allowing amendments to them. It has become so, by these statutes, that almost any reasonable amendment may be made to the complaint or declaration of the plaintiff; and where, under the common-law rule, the plaintiff may have been demurred out of court, he may, under the statute rule, reinstate his case by an amendment of the error made in the declaration. Thus, where the declaration averred that the message was delivered to the company at a certain place on the line, but in fact it was delivered at another place, the declaration may be amended so as to correct the mistake¹⁹ The amendment may go further and show that the message was delivered to another company other than the defendant, but accepted by the latter;²⁰ but, in such a case, it seems that it must be shown that the defendant's negligence was the cause of the loss. A misnomer may be amended if the defendant is not prejudiced in his rights. The declaration may be amended so as to show a different amount and the

¹⁸ *Sherrill v. West. U. Tel. Co.*, 109 N. C. 257, 14 S. E. 94. See, also, *Loper v. West. U. Tel. Co.*, 70 Tex. 689, 16 Am. St. Rep. 864.

¹⁹ *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100.

²⁰ *Id.*

character of the damages claimed. But we think if the negligent act of the defendant occurred in a certain manner, an amendment cannot be made without the defendant having a ground for continuance of the cause, where the act is averred as having occurred otherwise, and materially different to that first alleged in the pleadings. It is unnecessary to discuss this subject further, since there have been volumes more ably written on this particular subject which are available.

§ 503. Action—whether in contract or in tort.

Sometimes it becomes difficult for the court to decide whether the action is brought for a breach of the contract of sending or whether it is for a breach of its public duty. In order to determine this fact, the court should look to the nature of the cause of action stated in the complaint or declaration, and if the special contract is not set out they will generally construe the pleadings as founded in tort.²¹ It has been held that where the action is founded on a special contract and a breach thereof resulting in damages to the plaintiff, it is not necessary to allege in the complaint that the defendant is a public corporation, or a common carrier for hire, where it is made so by statute; but where the action is founded in tort, or a breach of its public duties, it is necessary to state these facts, or averments equivalent thereto.²² Sufficient facts must be averred to show that it has public duties to perform, and that it has failed to discharge these to the injury of the plaintiff.²³ It is generally held that a declaration is demurrable where it contains two counts, one where it is averred that the defendant is guilty of a breach of a contract and the other which alleges that it has negligently failed to discharge its public duty.²⁴ In other words, counts in tort and counts in contract cannot be joined in the same action.

²¹ *Frink v. Potter*, 17 Ill. 406; *Heil v. St. Louis, etc., R. Co.*, 16 Mo. App. 363; *Atlantic R. Co. v. Laird*, 58 Fed. 760; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660; *Heim v. McCaughan*, 32 Miss. 17.

²² *Bristol v. Rensselaer, etc., R. Co.*,

9 Barb. (N. Y.) 158; *Southern Ex. Co. v. McVeigh*, 20 Gratt. (Va.) 264.

²³ *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23, 9 So. 414.

²⁴ *Norfolk, etc., R. Co. v. Wysox*, 82 Va. 250.

§ 504. Actions for statutory penalty.

Following the general rule that penal statutes must be strictly construed, it is held that the pleadings in an action brought against telegraph companies to recover a statutory penalty, are usually enforced with more strictness than pleadings in the ordinary actions to recover damages. The complaint or declaration must allege all the facts necessary to bring the case not only within the letter of the statute but within its spirit as well.²⁵ Thus, it must allege that the charges were paid or tendered, and that the case comes within the statute.²⁶ So, if the statute provides that only such companies as are "engaged in telegraphing for the public," and the allegations in the complaint state that it was "engaged in the business of transmitting telegraphic dispatches for hire," this will not be a compliance with the statute.²⁷ A statutory penalty cannot be recovered where the complaint avers that the defendant negligently *transmitted* a message whereby he suffers a loss, when the statute provides that the recovery can only be had where the company has negligently *delayed the delivery* of the message, or *vice versa*.²⁸ It is not necessary for the copy of the message to be set out in the pleading in these cases;²⁹ nor is it necessary that it should negative matters of defense.³⁰ Thus, where the rule of the company is that it will deliver all messages free of charge within the free-delivery limit, it is not necessary for the declaration to contain an averment that the addressee lived within the free-delivery limits, since if such should not be the facts, it is a defense to be used by the company.³¹ It is a general rule of proceed-

²⁵ West. U. Tel. Co. v. Kinney, 106 Ind. 468; Greenberg v. West. U. Tel. Co., 89 Ga. 754.

²⁶ West. U. Tel. Co. v. Mossler, 95 Ind. 32; West. U. Tel. Co. v. Ferguson, 57 Ind. 495.

In a common law remedy to recover damages, it is not necessary to show that the charges were paid: West. U. Tel. Co. v. Meek, 49 Ind. 53; Milliken v. West. U. Tel. Co., 110 N. Y. 403. But all the facts enumerated in the statute as necessary to render the contract valid, must be shown: Gist v.

West. U. Tel. Co., 45 S. Car. 344, 55 Am. St. Rep. 763, 23 S. E. 143.

²⁷ West. U. Tel. Co. v. Axtell, 69 Ind. 199; West. U. Tel. Co. v. Roberts, 87 Ind. 377; West. U. Tel. Co. v. Adams, 87 Ind. 598, 44 Am. Rep. 776.

²⁸ Wilkins v. West. U. Tel. Co., 68 Miss. 6, 8 So. 678.

²⁹ West. U. Tel. Co. v. Meredith, 95 Ind. 93.

³⁰ Cowan v. West. U. Tel. Co., 122 Iowa 376, 98 N. W. 281, 101 Am. St. Rep. 268; West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419.

³¹ Id.

ure that the proof must be consistent with the averments in the pleadings, but if the variance is on immaterial allegations, the complaint will be good.³² It is only where the variance is on material averments that the rule is applicable. If the message was delivered to the company on Sunday, the declaration must allege its necessity of being sent on that day, in order to recover under these statutes.³³

§ 505. Plea to the declaration.

At the common law, whether the action sounded in contract or in tort, it was generally sufficient for the company to plead the general issue,³⁴ and a general denial will be sufficient in the states in which the code procedure is used, but as new matter must be specially pleaded under the code, it will sometimes be necessary, or rather advisable, to answer specially.³⁵ Thus, if the claim is not presented within the required time, or if the message was not ordered to be repeated, or if there is a failure on the part of the plaintiff to comply with any of the stipulations contained in the message blank, the plea should specially aver these facts. If the message is sent in cipher, and the company is not informed of its importance, an averment of this fact should be made; and it will be an error in the court to strike from the plea such an averment.³⁶ The plaintiff should have notice of the rules of the company in order for them to be binding on him; and if a plea to a complaint against one of these companies avers that a message, received for transmission, was written on one of the blanks upon which the requirement for notice of damages within sixty days was printed, and was sent subject to the contract expressed thereon and of which this requirement was a part, it is equivalent to an averment of notice of the rule on plaintiff's part.³⁷

³² Thus, where the complaint alleged that the message sent in March, the plaintiff might still show it to have been sent in January: *West. U. Tel. Co. v. Kilpatrick*, 97 Ind. 42.

³³ *West. U. Tel. Co. v. Yopst*, 118 Ind. 248; *West. U. Tel. Co. v. Griffin*, 1 Ind. App. 46.

³⁴ *Hutchinson on Carriers*, (2 Ed.). § 758; *I. C. R. Co. v. Johnson*, 34 Ill. 389; *St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 7 Sup. Ct. R. 1132.

³⁵ *Missouri Pac. R. Co. v. Wichita, etc., Co.*, 55 Kan. 525, 40 Pac. 899; *Atchison, etc., R. Co. v. Bryan* (Tex.) 28 S. W. 98.

³⁶ *Hill v. West. U. Tel. Co.*, 42 S. Car. 367, 46 Am. St. Rep. 734, 20 S. E. 135.

³⁷ *Harris v. West. U. Tel. Co.*, 121 Ala. 519, 25 So. 910, 77 Am. St. Rep. 70.

§ 506. The issue.

In an action brought against a telegraph company for damages, the recovery will be limited as in all other cases against corporations or private persons, to the issue involved, and, it seems that, if the complaint counts entirely upon the failure of the company to promptly deliver the message, he cannot recover where the loss has been sustained by a negligent transmission.³⁸ In such a case, however the pleadings may be amended so as to be consistent with the proof. In an action to recover damages for the death of a horse, caused by the delay of the company in delivering a message requesting the attendance of a veterinary surgeon, the sole issue is whether such death was due to delay in the treatment, caused by the failure to deliver the message, regardless of negligence in the treatment of the horse after the dispatch was delivered.³⁹

§ 507. Presumption of negligence—burden of proof.

In ordinary actions brought to recover damages for personal injuries, there is probably no presumption of negligence against either party; the mere fact of injury being sustained, creates no such presumption, except where, from the peculiar circumstances involved, the familiar maxim of *res ipsa loquitur* is applicable.⁴⁰ But where an action is brought to recover damages from a telegraph company for negligently transmitting or delaying in the delivery of a message, the rule is different. In such cases, where it is shown that a message has been delivered to it and an error has been made in its transmission;⁴¹ or, that a delay has been made in its delivery;⁴² or, that it

³⁸ *Connell v. West. U. Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172 38 Am. St. Rep. 575.

³⁹ *Hendershot v. West. U. Tel. Co.*, 106 Iowa 529, 68 Am. St. Rep. 313, 76 N. W. 826.

⁴⁰ *Thompson on Neg.* 1227-1235, § 3; *Cooley on Torts* 796; *Shear. & Red. on Neg.* § 59; *Wharton on Neg.* §§ 421, 422; *Addison on Torts* 17, 366; *Bigelow on Torts* 596.

⁴¹ *West. U. Tel. Co. v. Short*, 53 Ark.

434, 14 S. W. 649; *West. U. Tel. Co. v. Griswold*, 37 Ohio St. 303, 41 Am. Rep. 500; *West. U. Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 975; *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4; *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

⁴² *Harkness v. West. U. Tel. Co.*, 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672; *Hendricks v. West. U. Tel. Co.*,

has been transmitted but not delivered;⁴³ or, that it has not been transmitted;⁴⁴ or, that a material word has been omitted in the message;⁴⁵ it is presumed that the company has been guilty of negligence, and the burden is on the latter to disprove such negligence.⁴⁶ This is the universal rule; and when the plaintiff has shown a delivery to the company and that an error has been made, or that the message has been delayed in its delivery, his case is made out. The reason of the rule is obvious. If the burden were cast upon the plaintiff, he could never make out his case. It would be nothing more nor less than a fight in the dark to impose such a duty upon him, since the proof of these negligent acts are almost always in the sole possession of the defendant company. Being peculiarly within the knowledge of the company, it is no hardship on them to be required to furnish the proof of the causes of errors or delays. Therefore, one reason why we think the stipulation in the message blanks requiring the claim for damages to be presented to the company within a certain time is reasonable is, that the company may be notified of the injury in time to make a prompt investigation of the matter. The same rule will apply where the suit is against one company, when the error has been made on a connecting line. The burden is on the defendant to show that the connecting line, and not its own negligence, caused the loss.⁴⁷

126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; Tel. Co. v. Brown, 104 Tenn. 56, 50 L. R. A. 277, 78 Am. St. Rep. 906.

⁴³ Fowler v. West. U. Tel. Co., 80 Me. 381, 6 Am. St. Rep. 211.

⁴⁴ Id.

⁴⁵ Ayer v. West. U. Tel. Co., 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495.

⁴⁶ Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79; West. U. Tel. Co. v. Fontaine, 58 Ga. 433; Tyler v. West. U. Tel. Co. 60 Ill. 421, 14 Am. Rep. 38; West. U. Tel. Co. v. Ward, 23 Ind. 377, 85 Am. Dec. 462; West. U. Tel. Co. v. Meek, 49 Ind. 53; Turner v. Hawkeye Tel. Co., 41 Iowa 458, 20 Am. Rep. 605; De La Grange v. Southwest-

ern Tel. Co., 25 La. Ann. 383; West. U. Tel. Co. v. Goodbar, (Miss.) 7 So. 219; Rittenhouse v. Independent Line of Tel. 44 N. Y. 263, 4 Am. Rep. 673; Pearsall v. West. U. Tel. Co., 124 N. Y. 256, 21 Am. St. Rep. 662, aff'g. 44 Hun (N. Y.) 532; United States Tel. Co. v. Wenger, 55 Pa. St. 262, 93 Am. Dec. 571; Bartlett v. West. U. Tel. Co., 62 Me. 209, 16 Am. Rep. 437; Cowan v. West. U. Tel. Co., 122 Iowa 379, 64 L. R. A. 545, 98 N. W. 281, 101 Am. St. Rep. 281. See, also, cases cited in notes 41, 42, 43, 44, 45.

⁴⁷ In *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383, the defendant company contended that it was not the first carrier and that the plaintiff

§ 508. Same continued—effect of stipulation.

It has been held that proof of delivery of a message to the company for transmission, and an error made in the transmission or a delay in its delivery, will not alone authorize the recovery of more than the price paid for transmission, where the contract of sending contained special limitations of the company's liability. Thus, in some of those jurisdictions which hold the stipulation reasonable which requires the message to be repeated, otherwise the company will not be liable beyond the amount paid for transmission, it is held that such negligence—except for willful misconduct or gross negligence—of the company is not presumed, but that the burden is cast upon the sender to show such by independent facts or by circumstances connected with the principal fact.⁴⁸ It was at first, and is now, difficult to show by what method the plaintiff can prove the negligence of these companies; but any independent fact or circumstance, connected with the principal fact, may be resorted to for such proof. It must be understood that this rule is only applicable in those jurisdictions where such stipulations are held as being reasonable.⁴⁹

§ 509. Evidence.

It does not matter whether the plaintiff sues on the contract of sending, or upon the breach of duty, in order to recover damages for loss or injury sustained by an error made in the transmission or de-

failed to prove that the error in transmission occurred on its line, and showed an expressed provision in its printed blanks that it would not be liable for errors occurring on connecting lines. It was held that whether defendant was the first carrier or not, it was peculiarly within its power, and it was its duty to prove that the error did not occur on its line.

⁴⁸ *Womack v. West. U. Tel. Co.*, 58 Tex. 180, 44 Am. Rep. 611; *Aiken v. West. U. Tel. Co.*, 69 Iowa 31, 28 N. W. 419, 58 Am. Rep. 210; *West. U. Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Sweetland v. Illinois, etc.,*

Tel. Co., 27 Iowa 433, 1 Am. Rep. 285; *West. U. Tel. Co. v. Bennett*, 1 Tex. Civ. App. 558; *Redington v. Pac. Postal Tel. Cable Co.*, 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132. See following cases holding a contrary view: *Gillis v. West. U. Tel. Co.*, 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611n, 15 Am. St. Rep. 917, and note; *Note to Pepper v. Tel. Co.*, 10 Am. St. Rep. 711; *West. U. Tel. Co. v. Crall*, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795; *Ayer v. West. U. Tel. Co.*, 79 Mo. 493, 1 Am. St. Rep. 353, 10 Atl. 495.

⁴⁹ See note 48 for contra cases.

lay in the delivery; in either case he must prove, in general, a delivery of the message to the company, a contract on its part either express or implied to transmit the message, and its failure to perform the duty according to the agreement.⁵⁰ In other words, he must show that the company owes him a duty which is imposed on it by law, or which arises out of a contract, and a breach of this duty, whereby he has suffered a loss or an injury. We have, elsewhere, considered what evidence was necessary to constitute a delivery; what necessary to constitute a contract; what presumption arose in such cases; what must be shown where there are connecting lines; and, upon whom the burden of proof rests. We shall later consider, at some length, the admissibility of telegrams as evidence, so there is but little to be said at this place. The rule for the admissibility of evidence against telegraph companies is the same as that in other cases;⁵¹ the evidence must always be responsive to the issue involved.⁵² As we have said, the company may defend by showing that the loss or injury was caused by the act of God, by the public enemy, by public authority, or by the fault of negligence of the plaintiff. Therefore, any evidence may be admitted which goes to show that the loss or injury resulted from anyone of these causes. These companies may, also, as elsewhere stated, limit their common-law duty to a certain extent by a special contract to that effect, or they may limit their other liabilities by stipulations contained in the contract of sending; and when the damages sustained fall within such limitations or result from a non-compliance with them, evidence which tends to show such facts may be admitted.

§ 510. Same continued—illustrations.

No evidence should be admitted which will, in any way, prejudice the rights of either the plaintiff or the company. So, it is not proper

⁵⁰ *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662; *Angell on Carriers* (5th Ed.), § 461; *Hutchinson on Carriers* (2d Ed.), § 759. See, also, *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4.

⁵¹ *Louisville, etc., R. Co. v. Natces*,

etc., R. Co., 67 Miss 399, 7 So. 350.

⁵² *Chicago, etc., R. Co. v. Hoefner*, 44 Ill. App. 137; *Kyle v. Buffalo, etc., R. Co.*, 16 U. C. C. P. 76. See, also, *New England, etc., Co. v. Slarin*, 60 Conn. 369, 22 Atl. 953; *Spurloek v. Missouri Pac. R. Co.*, 93 Mo. 530, 6 S. W. 349.

to admit evidence to show that the defendant is a wealthy corporation: it seems, however, that such evidence may be admitted when there has been a willful injury and exemplary damages are claimed.⁵³ Evidence which shows the embarrassed financial condition of the sender is inadmissible for the same reason, when the purpose of such is to have a bearing on the question of damages for the loss of a valuable bargain in consequence of the company's negligence.⁵⁴ Evidence cannot be admitted to show that, for the alleged negligence, a deduction had been made from the pay of the operator by one of the superior officers.⁵⁵ Where the plaintiff sues to recover damages sustained by a failure to deliver a message to a physician, requesting him to visit the former's family; evidence which tends to show that the medical charges were not prepaid according to the physician's practice is inadmissible.⁵⁶ The statements or declarations of the agents or operators of these companies are only admissible when others, similar to these, are allowed in other cases; that is, they can only be admitted when they became a part of the *res gestae*.⁵⁷ The plaintiff may introduce evidence showing that other messages were sent on the same day as his, and were properly transmitted and delivered;⁵⁸ and when the action is for mental suffering, caused by the plaintiff being kept away from the bedside of his dying mother, evidence may be admitted to show that the plaintiff was the favorite child of the mother.⁵⁹ Where the plaintiff's good faith, in making a certain purchase in pursuance of the erroneous telegram, is in question, he may show his understanding of the message and that he acted on the basis of such understanding.⁶⁰ It may be said, in

⁵³ West. U. Tel. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419.

⁵⁴ West. U. Tel. Co. v. Way, 83 Ala. 542, 4 So. 844.

⁵⁵ Grinnell v. West. U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485.

⁵⁶ West. U. Tel. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419.

⁵⁷ Aiken v. West. U. Tel. Co., 5 S. C. 358; West. U. Tel. Co. v. Way, 83 Ala. 542, 4 So. 844; West. U. Tel. Co. v. Cooper, 71 Tex. 507, 1 L. R. A. 728,

10 Am. St. Rep. 772; West. U. Tel. Co. v. Lydon, 82 Tex. 364. See, also, Union R., etc., Co. v. Riegel, 73 Pa. St. 72; Green v. Boston, etc., R. Co., 128 Mass. 221, 35 Am. Rep. 370; Bennett v. Northern Pac. R. Co., 12 Ore. 49, 6 Pac. 160; Queen v. Peters, 16 New Bruns. 77.

⁵⁸ West. U. Tel. Co. v. Lydon, 82 Tex. 364.

⁵⁹ Id.

⁶⁰ Aiken v. West. U. Tel. Co., 69 Iowa 31, 58 Am. St. Rep. 210, 28 N. W. 419.

conclusion, that all evidence pertinent to the substantial issue involved, and tending in anywise to throw light on the whole transaction, is admissible.⁶¹

§ 511. Question for jury.

It is always the rule of practice that the court must decide on the admissibility of evidence, but when it is admitted and contradicted, the jury are the sole judges of its weight and credibility. They should consider the character of the witnesses, the manner of their testifying and the interest, if any, which they may have in the result of the case, and give their evidence such weight as the circumstances would permit. There is no difference in the rule of law regarding the facts to be deliberated upon in cases, against telegraph companies, and that arising in other cases; but we shall particularize, to a certain extent, cases against these companies. Telegraph companies must exercise reasonable diligence in delivering telegrams, and what will constitute such diligence, in a particular case, depends upon the circumstances of that case, of which the jury are the exclusive judges.⁶² Thus, an agent of one of these companies, who undertakes to deliver a message outside of office hours, is acting within the scope of his agency, and the company is liable for his failure to exercise reasonable diligence. Whether or not such diligence was exercised, is a question for the jury.⁶³ It is also a question for the jury as to whether the company exercised reasonable diligence and care in delivering the message to the addressee; and where the latter is away from home, it is error for the court to instruct the jury that it was the duty, in such cases, to deliver the message to the addressee's wife, since she is not, in law, the agent of her husband.⁶⁴ Where

⁶¹ *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751. See, also, *West. U. Tel. Co. v. Stevenson*, 128 Pa. St. 442, 18 Atl. 441, 5 L. R. A. 515, 15 Am. St. Rep. 687; *West. U. Tel. Co. v. Collins*, 45 Kan. 88, 25 Pac. 187.

⁶² *West. U. Tel. Co. v. Cooper*, 71

Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; *Coit v. West. U. Tel. Co.*, 130 Cal. 657, 53 L. R. A. 678, 80 Am. St. Rep. 153, 63 Pac. 83.

⁶³ *McPeck v. West. U. Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205, 43 L. R. A. 214, 78 N. W. 63.

⁶⁴ *West. U. Tel. Co. v. Mitchell*, 91 Tex. 454, 44 S. W. 274, 66 Am. St.

the question was at issue as to whether the addressee knew of the stipulations contained in the message blanks, it must be determined by the jury.⁶⁵ The question as to whether the plaintiff contributed to the injury or loss, or whether it was the result of some uncontrollable cause, should also be left to the determination of the jury.

§ 512. Instructions to juries.

The jury being in possession of all the evidence in the case, it is the duty of the court to instruct them on the law pertaining to the issue involved; and the manner in which this is done is not different from that in other cases. In a great number of cases brought against these companies for damages, it is generally alleged that the loss or damage has been brought about by the negligence of the company, or some of its employees; and more especially is this the case where the action is for a breach of its duty. On the question of negligence, a charge that the question of diligence is one to be determined by the jury from all the facts and circumstances; and if they should believe from such evidence that the company used such care and diligence as a prudent man under like circumstances would use in his own behalf to deliver the message, and failed through no fault of his own, would be proper.⁶⁶ If the objects of the message could not have been accomplished, even though the company had not been guilty of negligently transmitting or delivering it, the company should not be held liable, and the jury should be so instructed;⁶⁷ and, where the averment in the declaration is that the message was properly transmitted from the receiving office, the court should charge the jury to confine their inquiry to the question of proper care or negligence in delivering the message, although there is evidence that it was delayed for sometime at the receiving office.⁶⁸ Where the action is to recover damages for mental or physical suffering, it is

Rep. 906. See monographic notes to West. U. Tel. Co. v. Houghton, 27 Am. St. Rep. 923; West. U. Tel. Co. v. Moore, 54 Am. St. Rep. 521.

⁶⁵ Webbe v. West. U. Tel. Co., 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670.

⁶⁶ Gulf, etc., R. Co., v. Wilson, 69 Tex. 739.

⁶⁷ West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772.

⁶⁸ Id.

proper for the court to distinguish between suffering actually endured and the suffering which is necessarily an incident to the inducing cause of such suffering. Thus, in an action brought to recover damages for injuries to a wife by the failure of a telegraph company to deliver a message sent to her physician, the court should charge the jury in such a way as to distinguish between suffering actually endured by her and the suffering necessarily incident to her confinement.⁶⁹ If the plea of defendant should contain averments to the effect that the plaintiff contributed to the loss, and there is evidence to sustain the averments, it will be error for the court to charge the jury that the defendant is liable, if they find that it negligently transmitted or delivered the message.⁷⁰

§ 513. Withdrawing the case from the jury.

It often becomes of the utmost importance as to whether, in the interest of justice, a case should be withdrawn from the jury by the court or should be submitted under proper instructions. Where the facts are undisputed and but one legitimate inference could be drawn from them, the question becomes one of law, and the case should, therefore, be decided by the court.⁷¹ It is held, therefore, in some jurisdictions that, if the evidence is so conclusive that the court would be compelled, under proper application, to set aside a verdict found contrary to the facts in the case, the case should be withdrawn from the jury.⁷² A mere scintilla of evidence is not sufficient to require a case to be submitted to a jury,⁷³ and if the plaintiff fails to prove the cause of action stated in his declaration, or a single and

⁶⁹ Id.

⁷⁰ West, U. Tel. Co. v. McNair, 23 So. (Ala.) 801.

⁷¹ Hathaway v. East Tenn., etc., R. Co., 29 Fed. 489; Pursell v. English, 86 Ind. 34, 44 Am. Rep. 255; Williams v. Guile, 117 N. Y. 343, 6 L. R. A. 366; People v. People's Ins. Exch. 126 Ill. 466, 18 N. E. 774, 2 L. R. A. 340; McMurtry v. Louisville, etc., R. Co., 67 Miss. 601, 7 So. 401.

⁷² Randall v. Baltimore, etc., R. Co., 109 U. S. 478, 3 Sup. Ct. R. 322; Schofield v. Chicago, etc., R. Co. 114 U. S. 615, 5 Sup. Ct. R. 1125; Mynning v. Detroit, etc., R. Co., 64 Mich. 93, 31 N. W. 147, 8 Am. St. Rep. 804; Grube v. Missouri Pac. R. Co., 98 Mo. 330, 11 S. W. 736, 4 L. R. A. 776.

⁷³ Hathaway v. East Tenn., etc., Co., 29 Fed. 489.

vital essential element thereof,⁷⁴ the case should be withdrawn from the jury upon proper application. But if the facts are disputed and the evidence conflicting, or more than one inference can be drawn from it, the case should be usually left to the determination of the jury.⁷⁵ As stated elsewhere, presumptions may make out a *prima facie* case, and when they do, and there is no evidence to the contrary it is proper for the court to withdraw the case from the jury.⁷⁶ Thus, if the plaintiff should prove a delivery to the company and an error made in its transmission to his damage, and no proof is given on the part of the company to contradict such proof, the case should be withdrawn from the jury on a proper application made by the plaintiff. A case may be withdrawn from a jury by a demurrer to the evidence,⁷⁷ compulsory nonsuit,⁷⁸ or a peremptory instruction directing a verdict.⁷⁹ It is not the practice in all jurisdictions to allow a party to demur to the evidence, nor that of moving for a nonsuit, but it seems that nearly all the courts allow either party a peremptory instruction. This latter method is generally the proper way to withdraw a case from the jury, and it is an error of the court, under the rules given, to refuse to withdraw the case when the proper application and proof has been made.⁸⁰ The motion may be made by the company, either after the plaintiff has closed or after the evidence on both sides has been concluded.⁸¹ But if the defendant makes his motion at the close of the plaintiff's case, and afterwards introduces

⁷⁴ *Cordell v. New York, etc., R. Co.*, 75 N. Y. 330; *Meyer v. Manhattan, etc., Co.*, (Ind.) 43 N. E. 448; *Harrington v. Chicago, etc., R. Co.*, 53 Ill. App. 344.

⁷⁵ *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 14 Sup. Ct. R. 140; *Beatty v. Mutual, etc., Assn.* 75 Fed. 65; *I. C. R. Co. v. Turner*, 71 Miss. 402, 14 So. 450; *Avinger v. South Carolina R. Co.*, 29 S. C. 265, 13 Am. St. Rep. 716.

⁷⁶ *Talkington v. Parish*, 89 Ind. 202; *De Wald v. Kansas City, etc., Co.*, 44 Kan. 586, 24 Pac. 1101; *Ohio, etc., R. Co. v. Dunn*, 138 Ind. 18, 36 N. E. 702.

⁷⁷ 2 Elliott's Gen. P. §§ 855-871; *Pennsylvania Co. v. Stegemeir*, 118 Ind. 305, 1 Am. St. Rep. 136; *I. C. R. Co. v. Brown*, (Tenn.) 35 S. W. 560.

⁷⁸ *Fagundes v. Cent. Pac. R. Co.*, 79 Cal. 97, 3 L. R. A. 824; *McNally v. Phenix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475.

⁷⁹ *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 637.

⁸⁰ *Carroll v. Interstate, etc., Co.*, 107 Mo. 653, 17 S. W. 886, 17 S. W. 889; *Mynning v. Detroit, etc., Co.*, 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147.

⁸¹ 2 Elliott's Gen. P., § 888. Note to *People v. Peoples' Exch.* 2 L. R. A. 340.

evidence, it will be presumed that the company has waived its rights under the motion, and any exceptions which may have been taken to the ruling of the court thereon, unless a renewal is thereafter made.⁸² The plaintiff cannot, of course, successfully move the court to withdraw the case from the jury until the defendant has introduced its evidence.⁸³

⁸² *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 24 L. R. A. 215, 18 S. E. 782; *Northern, etc., R. Co., v. Mares*, 123 U. S. 710, 8 Sup. Ct. R. 321; *Joliet, etc., R. Co. v. Shields*, 134 Ill. 209, 25 N. E. 569; *Chicago, etc., R. Co. v. Van Vleet*, 143 Ill. 480, 32 N. E. 262.

⁸³ *Kingford v. Hood*, 105 Mass. 495.

CHAPTER XXI.

MEASURE OF DAMAGES.

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§ 514. Scope of chapter.

It is our purpose, in this chapter, to discuss at some length the amount of damages which may be recovered against telegraph companies for breaches of their contractual or public duties, and the means by which the measurement of same may be ascertained. While commenting upon this subject, it may be proper to state at the outset

that there is no visible distinction between the rule laid down and generally followed by all courts and text-writers to ascertain these facts in cases against telegraph companies, and that in actions against other corporations and private persons; for this reason it will not be necessary to discuss extensively the common and accepted rule whereby the measure of damages is ascertained in such cases, but simply to explain and illustrate this rule as it is applicable particularly to actions against telegraph companies.

§ 515. Damages defined.

The term "damages" means a pecuniary satisfaction which a party may recover against another, in an action wherein it is alleged that the latter has infringed upon some of the former's legal rights to his loss or injury. So, it will be seen that there must be an infringement of some legal right before an action can be maintained; and, when there has been an infringement of these rights, damages inevitably result. It is the act of infringement of these legal rights, and not the consequence of such act, which makes out the case, yet it is necessary to know the consequences in order to determine the amount of damages to be recovered. The general rule is, that damages are in the nature of a compensation; so, it follows from this that the plaintiff can recover, at the utmost, only such damages as are coextensive with the loss or injury sustained. If it cannot be shown that there is an injury or loss sustained by the act of infringement, only nominal damages can be recovered. The general rule is, that a party cannot recover an amount of damages greater than that which is coextensive with his loss; yet, this is no reason why he should always be thus limited in his recovery.¹

§ 516. General rule—*Hadley v. Baxendale*.

It being presumed that the plaintiff has been injured in some of his rights, and that he is entitled to be compensated in damages therefor, the question which then presents itself is, By what method can the amount to be awarded be measured; or, in other words, by what means can the loss or injury sustained be measured or deter-

¹ Gray on Tel. Co., § 80.

mined, so that the plaintiff may be awarded an amount in damages equivalent to, or coextensive with, the loss or injury as a compensation therefor? The rule laid down on this subject, and the one to be followed in this work, is so generally used that it has become a proverb in law, and is universally recognized and accepted as a fundamental principle in the law of damages for a negligent breach of a contract. The rule upon which all cases of this nature have been based, is that given in the well-known English case of *Hadley v. Baxendale*, and the exact statement of the rule therein given is that "when two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either as arising naturally, i. e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."² As can be seen, this rule excludes the consideration of all damages which are remote or speculative, and only such as are the proximate consequence of the injury complained of can be recovered. The rule itself is a definite statement of what damages the breach of a contract is the proximate cause,³ and the accepted maxim, *causas proxima non remota spectatur*, excludes the consideration of all damages which are not the proximate result of the injury alleged to have been committed.

² *Hadley v. Baxendale*, 9 Exch. 341.

³ *Primrose v. West. U. Tel. Co.*, 154 U. S. 1; *Pacific Postal Tel. Cable Co. v. Fleischner* (C. C. A.), 66 Fed. 899; *McBride v. Sunset Tel. Co.*, 96 Fed. 81; *West. U. Tel. Co. v. Henley*, 23 Ind. App. 14. Compare *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328; *Chapman v. West. U. Tel. Co.*, 90 Ky. 265; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *Bartlett v. West. U. Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *West. U. Tel. Co. v. Church*, 90 N. W. 878, 57 L. R. A. 909; *Mackay v. West. U. Tel.*

Co., 16 Nev. 226; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Curtin v. West. U. Tel. Co.*, 14 Misc. (N. Y.) 459; *Barnesville First Nat. Bank v. West. U. Tel. Co.*, 30 Ohio St. 565, 27 Am. Rep. 485; *West. U. Tel. Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549; *Rowell v. West. U. Tel. Co.*, 75 Tex. 26; 12 S. W. 534; *West. U. Tel. Co. v. Murray*, 29 Tex. Civ. App. 207; 68 S. W. 449; *Fisher v. West. U. Tel. Co.*, 96 N. W. 345.

§ 517. Same continued—not only actual but contemplative damages.

It is not so difficult to understand the rule, as it is very clear that the injured party should recover all the damages caused as a proximate result of a breach of a contract, but it is its application to the different cases which puzzles and confuses the courts.⁴ The rule does not become much more comprehensive when it further states that the damages must flow directly and naturally from the breach and that they must be certain, both in this nature, and in respect to the cause from which they proceed. Under this rule, only such damages can be recovered as may fairly be supposed to have entered into the contemplation of the parties' minds at the time of making the contract, as might naturally be expected to arise from its breach. As was very ably said on this subject: "It is not required that the parties must have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. . . . as both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into. I think a more precise statement of this rule is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject and had been fully informed of the facts."⁵ It is questionable in considering this subject—and much more so is it the case, when applying the rule to actions against telegraph companies—as to the extent of the information which the company may have of the nature of the message, and the effect in negligently transmitting or delivering it. It is very often the case that messages are couched in such language as to be wholly unintelligible to the company. They may be entirely clear and easily understood, both by the sender and the addressee, but at the same time

⁴ Leonard v. New York, etc., Tel. Co., 41 N. Y. 544; Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. (U. S.) 44.

⁵ Leonard v. New York, etc., Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446;

West. U. Tel. Co. v. Church, 90 N. W. 878, 57 L. R. A. 909; West. U. Tel. Co. v. Edmondson, 91 Tex. 206, 42 S. W. 549, 66 Am. St. Rep. 873.

the company or the operator may be altogether ignorant of the purposes of them. So, it follows from the general rule that, in order to hold these companies liable for damages flowing directly and proximately from the breach of the contract of sending, they must have had some knowledge of the nature of the contract and the damages which may be supposed to have entered into the contemplation of the parties' minds at the time the contract was made, as may have been expected to be the result of its breach. The reason of this is obvious: since, if the nature and object of the message had been known, the parties might have specially provided for the breach of the contract by special terms as to damages in that case.⁶

§ 518. Actions in contract and in tort—applicable to both.

While actions against telegraph companies are not necessarily or usually brought for a breach of their contracts, but for the breach of a public duty, yet the latter, as said, depends somewhat upon the former, since it would not have occurred had it not been that the company violated its contractual duties. The general rule, however, for ascertaining the measure of damages is applicable in both kinds of actions. In an action in tort, or for a breach of a public duty, the damages which a plaintiff can recover are in satisfaction of the natural and proximate consequence of the defendant's act;⁷ in other words, they are in satisfaction of the loss that might reasonably have been expected under the particular circumstances to occur. While this rule is applicable to both kinds of actions, it must be understood, however, that the character or the nature of the damages may be different in each. For instance, punitive damages may be recovered in an action of tort, where it was committed with a malicious motive, but it cannot be recovered in an action *ex contractu*. So, also, as it will be further discussed later, it seems that the company need not have had the same information of the nature of the message and the probable result which would arise in a failure to transmit or deliver it, as it would in an action brought for a breach of its contract, in order to hold it liable in an action in tort. In other words, where the action is in contract, the damages are restricted to a more

⁶ Gray on Tel. Co., § 80.

⁷ Sutherland on Dam. 21.

narrow limit than in actions in tort. As was said: "In all actions sounding in tort, the injured party is not limited to damages which might reasonably have been within the contemplation of the parties, but recovery may be had for all the injurious results which flow therefrom, by ordinary, natural sequence, without the interposition of any other negligent act or overpowering force."⁸

**§ 519. Same continued—character of damages arising from each
—kind of actions—amount of information.**

The amount of information of the purpose of a telegram, necessary to hold these companies liable in actions in contract and in tort, may be different, or equal, yet it comes from different sources, of some of which the company is presumed to take cognizance. Having certain public duties to perform, on a failure to properly discharge them, they will be liable to anyone injured thereby. For instance, they hold themselves out as being ready and willing to transmit all proper messages tendered to them; and, as people seldom resort to these companies for their services unless the matter is of much importance and must be attended to quickly it is presumed that they will transmit the message in the exact words in which it was delivered to them, and deliver it to the addressee as promptly and speedily as it is possible for them to do. This is a public duty which they owe to everyone who applies to them for services, and one which they must take daily cognizance of; and, when they fail to discharge this duty, it is supposed that they contemplated, at the time of accepting this service, the result of such failure. It is further presumed that they know—where no information is given them to the contrary—that all messages delivered to them

⁸ *Mentzer v. West. U. Tel. Co.*, 93 Iowa 757, 62 N. W. 1, 57 Am. St. Rep. 294; *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *West. U. Tel. Co. v. Allen*, 66 Miss. 549, 6 So. 461; *Ellis v. American Tel. Co.*, 13 Allen 226; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4

Am. St. Rep. 126; *Milliken v. West. U. Tel. Co.*, 110 N. Y. 403, 1 L. R. A. 281; *Young v. West. U. Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669n; *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844.

are of importance, and that great loss or injury may be the result of a failure on their part to properly discharge their duty; and that they, therefore, are supposed to have contemplated all the damages flowing naturally and directly from such failure, although they may not have had any actual knowledge of what damages might result at the time of accepting the message. In an action brought against them for a breach of their contract, they are not held liable for a breach of their public duty, but are responsible for only such damages as may have been the direct and proximate result of the breach of contract, and such as may have been contemplated at the time of making the contract. The information of the importance of the message and the probable consequences of its not being properly sent and delivered, do not come, as in actions in tort, from the public position which they occupy.

§ 520. Damages recoverable—illustrative cases.

Actual damages, sustained by reason of failures, delays, or errors of a telegraph company in transmitting or delivering messages intrusted to it, may be recovered by the sender when such damages are the natural and proximate result of the company's default, and may be fairly considered to have been in the contemplation of the parties when the contract was made.⁹ In a certain case on this point, the plaintiff, in reply to a message from his agent informing him of the failure of a certain firm, and inquiring of the amount due from them to him, sent this message: "Due, 1,800; attach if you can find property. Will send note by tomorrow's stage." The message was delayed through the gross negligence of the telegraph company, and when it reached its destination all the property of the firm had been attached, so that plaintiff's claim was wholly lost. The loss of the debt was held to be the natural and proximate damages

⁹ *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *West. U. Tel. Co. v. Graham*, 1 Cal. 230, 9 Am. Rep. 136; *West. U. Tel. Co. v. Shotter*, 71 Ga. 760; *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *West. U. Tel. Co. v. Valentine*, 18 Ill. App. 57; *West. U. Tel. Co.*,

v. Harris, 19 Id. 347; *Hadley v. West. U. Tel. Co.*, 115 Id. 191; *Sprague v. West. U. Tel. Co.*, 6 Daly 200; *Mowry v. West. U. Tel. Co.*, 51 Hun 126; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 75; *Marr v. West. U. Tel. Co.*, 85 Tenn. 529; *Pep- per v. Tel. Co.*, 87 Id. 554.

resulting from the company's failure to perform its contract.¹⁰ The same principle was applied in a case where the plaintiff delivered to the defendant's agent the following message to be sent to his broker at New York: "Sell one hundred (100) Western Union." As delivered to Wrenn, the broker in New York, it read: "Sell one thousand (1,000) Western Union." Wrenn thereupon sold one thousand shares of the stock of the Western Union, and to replace the nine hundred shares had to buy on a rising market. The difference between the buying and selling price was \$729.75, and this amount was wholly lost to the plaintiff. This loss was held to be the measure of his damages.¹¹ In another case a merchant sent through the defendant a message informing the plaintiff that he would sell him apples at \$1.75 per barrel. The company delivered the message stating \$1.55 as the price per barrel. The plaintiff then ordered the apples, and had to pay the \$1.75 to have them delivered to him. The difference was held to be the measure of his damages.¹² A steamboat company sent a telegram to the plaintiff offering him \$150 per month to go on a trip as a steamboat pilot, and for the season if he suited. Through the negligence of the company the message was not delivered until the boat had sailed, and the plaintiff lost the employment, and failed to get other employment for a considerable time thereafter; the loss of wages thereby sustained was held to be the measure of his damages.¹³

§ 521. Same continued.

In another case, the plaintiff lost a year's employment through the defendant's negligence in failing to seasonably deliver a message, and it was held that the measure of his damages was the difference between what he would have received and what he actually made during the year;¹⁴ but if the employment, lost through the default of the company, was terminable at the will of either party, nominal

¹⁰ *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589. The same was held in the case of *Baldwin v. American Tel. Co.*, 1 Daly 575.

¹¹ *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38.

¹² *West. U. Tel. Co. v. Du Bois*, 128

Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4.

¹³ *West. U. Tel. Co. v. Fenton*, 52 Ind. 1.

¹⁴ *West. U. Tel. Co. v. Valentine*, 18 Ill. App. 57.

damages only could be recovered.¹⁵ The plaintiff, in another case, had sold cattle for future delivery, at the option of the purchaser. The latter sent a dispatch informing him that he would take the cattle on the morning of the next day. It was the custom of stock dealers to take the weight of cattle at early daylight. Through the negligence of the company to promptly deliver the message, the weighing of the cattle was delayed, whereby their weight was decreased. It was held that the defendant was liable in damages for the loss of the weight resulting from its negligence.¹⁶ The plaintiff's correspondent sent him this message: "Ship your hogs at once." The delivery of the message was delayed four days by the defendant's negligence. It was held that the plaintiff could recover the difference between the market value of the hogs on the day when they would have been delivered had the message been promptly delivered, and the market value on the day the plaintiff was able to deliver them after the actual receipt of the message.¹⁷ In another case, the defendant had contracted to furnish to the plaintiff, the Chicago market report. It furnished to him an incorrect report, by reason of which the plaintiff was induced to purchase a quantity of grain to fill a contract for future delivery. It was held that the measure of damages was the difference between the actual purchase price and the price as represented by the report.¹⁸ The plaintiff in reply to an offer of a cargo of corn, sent this message: "Ship cargo named at ninety, if you can secure freight at ten." The message was not delivered. The price of corn and freight advanced immediately after, and the plaintiffs were obliged to buy at the advanced rate. It was held that the measure of damages was the difference between the ninety cents named and the sum which the plaintiffs were or would have been compelled to pay at the same place, in order to purchase the like quantity and quality of corn, upon proof that the corn could have been shipped by the sellers at that rate, had the telegram been duly received.¹⁹ The same principle was held in another case,

¹⁵ *Merrill v. West. U. Tel. Co.*, 78 Me. 97.

¹⁶ *Hadley v. West. U. Tel. Co.*, 115 Ind. 191.

¹⁷ *Manvill v. West. U. Tel. Co.*, 37 Iowa 214, 18 Am. Rep. 8.

¹⁸ *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458, 20 Am. St. Rep. 605.

¹⁹ *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156. See, also, *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157.

where a message was sent to the plaintiff, a physician, summoning him to go on a professional visit to a patient. Through the defendant's negligence, the message was not delivered until it was too late, and the call was revoked. The testimony showed that five hundred dollars was a reasonable fee for the services expected to be performed and that the sender of the message was solvent. It was held that the measure of the plaintiff's damages was the difference between that sum and the amount he earned during the time he would have been absent on the visit.²⁰

§ 522. Same continued.

In another case, the plaintiff sent, through the defendant, to an attorney in Buffalo, this message: "Hold my case till Tuesday or Thursday. Please reply." The company never delivered the message, and the plaintiff, receiving no reply, concluded that a postponement of his case could not be obtained. He therefore went with his counsel to Buffalo, where he ascertained that the case had been continued, and in consequence he was compelled to make another trip to Buffalo. It was held, that he could recover the expenses of himself and his attorney on the first trip, and also the fee which he was obliged to pay his attorney for making that trip.²¹ The plaintiff's agent at Chicago sent to the plaintiffs at Oswego this message: "Send five thousand sacks of salt immediately." The company delivered the message reading "casks" instead of "sacks." The plaintiff shipped the casks, but there being no market for that kind of salt in Chicago at the time, it sold for less there than it was selling for at Oswego. It was held that the measure of damages was the difference between the market value at Oswego and at Chicago, together with the cost of transportation from Oswego to Chicago.²²

§ 523. Remote damages.

It is presumed that the reader has had cause ere this to study and master, to a certain extent, the difference between proximate and

²⁰ West. U. Tel. Co. v. Longwill, Sup. Ct. N. M.

²¹ Sprague v. West. U. Tel. Co., 6 Daly 200, aff'g, 67 N. Y. 590.

²² Leonard v. New York, etc., Tel. Co., 41 N. Y. 544; 1 Am. Rep. 446.

remote damages; for this reason—and for the further reason that the subject is, in a sense, foreign to the scope of this work—we shall refrain from entering into it at any great length. While there is a distinction between the two kinds of damages, yet in many instances the distinction is so slight that it is difficult to decide on which side the damages belong. The damages must be the natural and direct result of the breach, or such as flow therefrom by ordinary and natural sequence; if there is an addition of any other negligent act or overpowering force, intervening and aiding in anywise the result, the damages will be too remote to be recovered.²³ The law does not hold these companies liable for every possible consequence for their negligence, but only for such as are the probable and natural results of their wrongful acts.

§ 524. Same continued—speculative damages.

It must be borne in mind that, in order to recover damages from telegraph companies for their wrongful acts, the damages must be the result of the most probable and natural consequences of the act, and such as a man of ordinary care and foresight would have contemplated at the time the contract was made, as a probable result of a breach thereof, and not such as depended upon the happening of some possible event. The company's negligence may have had some casual connection with the damages complained of, and may have exerted a material influence in producing the final result, yet the company cannot be held liable for such damages when subsequent in-

²³ *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126; *West. U. Tel. Co. v. Hall*, 124 U. S. 444; *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Hadley v. West. U. Tel. Co.*, 115 Ind. 191; *West. U. Tel. Co. v. Crall*, 39 Kan. 580, 18 Pac. 719; *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. 530; *McCall v. West. U. Tel. Co.*, 44 N. Y. Sup. Ct. 487, 7 Abb. N. C. 151; *Baldwin v. United States Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154; *First Nat. Bank*

v. Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 485; *Reliance Lumber Co. v. West. U. Tel. Co.*, 58 Tex. 394, 44 Am. Rep. 620; *West. U. Tel. Co. v. Munford (Tenn.)*, 3 Pickel, 190, 10 S. W. 318; *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. 775; *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530; *Kinghorne v. Montreal Tel. Co.*, 18 Id. 60; *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715; *West. U. Tel. Co. v. Smith*, 76 Tex. 253, 13 S. W. 169; *Bodkin v. West. U. Tel. Co.*, 31 Fed. 134.

intervening causes took advantage of such negligence, and ultimately brought about the result of which complaint is made.²⁴ So, if the damages are uncertain and contingent and depending upon the happening of some possible event; in other words, one cannot recover for speculative or uncertain damages. Thus, where a complaint is made that a valuable note was lost by the failure of the company to deliver a telegram to the plaintiff announcing the serious illness of his father—who afterwards died—requesting him to come to his bedside, the negligence of the company is too remote from the possibility of his recovering the note to entitle him to recover. The court said, in deciding this case: “Perhaps his father would have given him the note. It would not, however, have been a natural consequence of his going to see him. He might, and he might not, have done so. No such loss would have been contemplated by the parties to the sending of the message, had their minds at the time been drawn to the contingency of its not being delivered. . . . As well might one claim from a railroad company the amount of a stake in a race upon the ground that if the train had not been negligently delayed, his horse would have arrived in time and won the race.”²⁵ So, also, the loss to plaintiff of customers, resulting from his failure to perform a particular contract, his failure being due to the negligent alteration of a message by the defendant’s company, is wholly speculative and conjectural, and cannot be considered in estimating the damages.²⁶

§ 525. Intervening causes.

If a subsequent intervening cause takes advantage of the negligence of the company, which may have had a casual connection with the result, and ultimately produces the damages complained of, the company will not be liable. In other words, damages cannot be recovered which are the result of the consequences of secondary and

²⁴ *Scheffer v. Washington, etc., R. Co.*, 105 U. S. 252; *Crain v. Petrie*, 6 Hill (N. Y.) 522, 41 Am. Dec. 765; *Lowery v. West. U. Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154; *First Nat. Bank v. West. U. Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485.

²⁵ *Chapman v. West. U. Tel. Co.*, 90 Ky. 265. Compare *West. U. Tel. Co. v. Crall*, 39 Kan. 580, 18 Pac. 719.

²⁶ *Fererro v. West. U. Tel. Co.*, 9 App. Cas. (D. C.) 455.

remote causes indirectly growing out of a breach of the contract.²⁷ Thus, where the loss is "occasioned by two causes—the shortcoming of the telegraph company in not delivering the message and the still shorter coming of a third person in appropriating to himself what belonged to another," the company will not be liable. In this case, a telegram was delivered to the company asking a remittance of \$500 from the addressee. Through the negligence of the company the message was changed so as to read \$5,000, and this amount was sent to the sendee who, on receiving this, absconded; it was held that the company was not liable. The court, said: "The embezzlement could not reasonably have been expected, and did not naturally flow from the wrong of the defendant. The cause of the loss was the criminal act of Brown, conceived and executed after the defendant had ceased to have any relation to the money. The plaintiff's right of action for the negligence was complete before the money was misappropriated by Brown; and if suit had then been brought, the damages would not have been measured by the amount of money sent by the plaintiff. The most that can be said is, that by the negligence of the company an opportunity was afforded Brown to commit a fraud upon the plaintiff. This does not, within the cases, make the company chargeable with the loss resulting from the conversion."²⁸ The same ruling was held in a case similar to the above, where the plaintiff sent a message inquiring as to the financial standing of certain parties who had presented drafts to them and concluded: "If everything is alright, you need not dispatch. If not right, answer by Saturday evening (13th)." On Monday at 4:55 p. m. a reply was delivered to the company stating "Parties will accept if bill of lading accompanies draft. Parties stand fair." This message was never transmitted and before three o'clock on the same day, the plaintiff, having received no reply, cashed the drafts, which were eventually lost. The court held that the dishonesty of the parties who drew the draft, and not the negligence of the company was the cause of the loss.²⁹

²⁷ *Pegram v. West. U. Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557. See note 24 for other cases.

²⁸ *Lowery v. West. U. Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154.

²⁹ *First Nat. Bank v. West. U. Tel. Co.*, 30 Ohio St. 555, 27 Am. Rep. 485.

§ 526. Benefit of contract—loss.

If the company negligently fails to transmit or deliver a message, relating to a sale or purchase, the profit or benefit expected to be made is too remote and speculative to be recovered when the contract is subject to be defeated by another's will.³⁰ Thus, in an action to recover damages caused by the company's delay in transmitting and delivering the following message: "Buy ten thousand if you think it safe;" the dispatch related to the purchase of oil, which, on the day on which the message should have been delivered, was selling at \$1.17 per barrel. On the next day the oil advanced to \$1.35 per barrel, and the person to whom the message was sent did not deem it advisable to buy, nor did he buy at any subsequent date. There was no evidence to show that the sender of the message intended to buy with the object of reselling immediately at a profit, or that he could have sold at a profit at any future time if he had bought. It was held that only the price of the message could be recovered. The court said, in deciding this case: "It is clear that in point of fact the plaintiff has not suffered any actual loss. No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th, and making a profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place."³¹ In another case, the suit was brought for the failure to deliver the following message: "Ship oil as soon as possible, at very best rates you can." Owing to the non-receipt of the dispatch, the oil was not sent, and the plaintiff claimed that he lost great gains and profits by the delay caused in the shipping of his oil. The court held that he could not recover the profits which he might have made on the oil, because they could not be fairly considered as having been in the contemplation of the

³⁰ *Johnson v. West U. Tel. Co.*, 79 Miss. 58, 29 So. 787, 89 Am. St. Rep. 584; *Merrill v. West U. Tel. Co.*, 78 Me. 97.

³¹ *West U. Tel. Co. v. Hall*, 124 U. S. 444.

parties to the contract when it was made.³² While he could not recover profits which might have been made, yet he may recover, in addition to the price of the message, the increased price of freight which he was subsequently obliged to pay for transporting the oil, and all other expenses necessarily incurred by reason of the company's failure to fulfill its contract.³³ So, it was held that the profits which the plaintiff might have made if he had received the message sent to him in time to have met the sender of the dispatch at the railway station, and rendered to him the services which he had telegraphed him to come and perform, could not be recovered by him as damages in an action against the defendant for its failure to deliver the message.³⁴ Neither can damages be recovered against a company for the loss of the prize purses which might have been won had a certain horse been present at a race, but which was away therefrom on account of the negligence of the company in transmitting a message relating thereto.³⁵

§ 527. Same continued.

In another case the plaintiff's brokers in New York, who had previously purchased other railroad stock for him, sent him a telegram to Eminence, Kentucky, where he then lived, informing him that they had bought for him additional railway stock. This message was never delivered and he was left in ignorance of the purchase. On the day the stock was bought it began to decline and continued to do so until the day which was known as "black Friday," when it was the greatest. On this latter date, the stock had so far declined that its value, together with the plaintiff's deposit with his brokers, did not equal what they had paid for it, and they therefore sold it, leaving him in debt to them, later a reaction occurred, and the stock was then selling for more than plaintiff had paid for it. He brought his action against the company for damages for its failure to deliver the message, saying that if he had received it he would have kept his "margin" good and thus saved all his stock. But it was held that

³² West. U. Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136.

³³ West. U. Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136.

³⁴ Clay v. West. U. Tel. Co., 81 Ga. 285, 6 S. E. 813.

³⁵ West. U. Tel. Co. v. Crall, 39 Kan. 580, 18 Pac. 719.

he could only recover nominal damages. Holt, J., who delivered the opinion of the court, said: "The consequence which resulted to the appellant was not the ordinary result of the failure to deliver the message in question, and hence cannot be supposed to have been in contemplation when the company undertook to transmit it. If the minds of the contracting parties had at the time been drawn to the contingency of a failure of performance, they could not possibly, from the nature of the dispatch, have contemplated the loss of which the appellant now complains; and in such a case, the company is only liable for nominal damages for its default."³⁶ So, also, if the message is in regard to the purchase of certain grain, but on the day following that on which the message should have been delivered, the price advances, and after this it fluctuates, going at times below the price of the grain on the day the message should have been delivered, and no purchases are made during this time, the plaintiff can only recover nominal damages.³⁷ Many other cases might be given.

§ 528. Effect of special circumstances.

It must ever be kept in mind, while considering the amount of damages to be recovered from a telegraph company for negligently transmitting or delivering a message, that only such can be recovered as might be supposed to have entered into the contemplation of the parties' minds at the time of making the contract, as would be the most probable and natural result of such negligence. If there were special circumstances connected with the sending of the message which would be the cause of a greater loss or injury in case it was not correctly transmitted and promptly delivered, the company will not be liable on account of these facts, unless it should have notice of such at the time the contract of sending was made.³⁸ It is not

³⁶ *Smith v. West. U. Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

³⁷ See note 24.

³⁸ *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 So. 814; *West. U. Tel. Co. v. Cornwell*, 2 Colo. App. 491; *Evans v. West. U. Tel. Co.*, 102 Iowa 219, 17 N. W. 219; *West. U. Tel. Co. v. Pearce*, 34 So. (Miss.) 152; *Melson v.*

West. U. Tel. Co., 72 Mo. App. 111; *West. U. Tel. Co. v. Lively*, 15 S. W. (Tex.) 197; *West. U. Tel. Co. v. J. A. Kemp Grocer Co.*, 28 S. W. (Tex.) 905; *West. U. Tel. Co. v. Parlin, etc.*, Co., 25 S. W. (Tex.) 40; *Reliance Lumber Co. v. West. U. Tel. Co.*, 58 Tex. 394, 44 Am. Rep. 620.

supposed that in every possible loss the company's negligence may be, to a certain extent, the cause; but it is only such results as a man of ordinary understanding might have contemplated would be the natural and probable result. So, if the special circumstances connected with the sending of the message were such as would not have been contemplated by the company as being a probable result of its negligence, the same cannot be considered in the awarding of damages. Thus, where plaintiff sent a message to her husband, requesting him to come home to their sick child, but the husband failed to reach home as soon as he would have done in case the message had been promptly delivered to him, the plaintiff cannot recover damages for physical and mental suffering brought about by reason of her pregnancy, while nursing the child, when the company had no knowledge of her pregnancy.³⁹ So, where the plaintiff received a message telling him that his trial was set for such a day, but the company negligently changed the date set for the trial, which caused the plaintiff to make a trip to the place at which the trial was to be had on the date stated in the message, it was held that he could not recover damages for his mill being necessarily kept idle during his absence, when the company had no information that this would be the result.⁴⁰ He may, however, be allowed his necessary expenses incurred in such a trip, including a reasonable attorney's fee.⁴¹

§ 529. How communicated to the company—information.

It is immaterial as to how the special circumstances may be communicated to the company; if it was sufficiently informed of this fact at the time the message was delivered, it will be liable for all damages arising directly therefrom. The information may be communicated by the message itself, which may have the nature of the special circumstances on its face.⁴² When this is the case, there is no doubt of the company's liability. And the information may be communicated to the operator at the time the message is delivered

³⁹ *West. U. Tel. Co. v. Pearce*, 34 So. (Miss.) 152.

⁴⁰ *West. U. Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649.

⁴¹ *Sprague v. West. U. Tel. Co.*, 6 Daly (N. Y.) 200.

⁴² *McCall v. West. U. Tel. Co.*, 44 N. Y. Super. Ct. 487; *Thompson on Elect.* §§ 315, 316.

to him, either by the sender or his agent. If it can be shown that the company or its operator acquired the information at the time the message was delivered for transmission, there is no doubt but that this is as good information as if the message itself showed the circumstances on its face. While the rule is, that extrinsic evidence cannot be admitted for the purpose of changing the terms of a written contract, yet it may be admitted for the purpose of showing what the intention was. Such evidence may be admitted to show what the parties contemplated, at the making of the contract, would be the supposed probable result of the breach of such contract.

§ 530. Same continued—damages—remote and speculative.

It does not matter whether there were special circumstances connected with the sending of the message, and that these facts were properly and sufficiently communicated to the company; they cannot control the measure of damages, where they are essentially remote or speculative in character. Thus, where the sender loses the opportunity to conduct a profitable speculation, or to secure contingent profits, he cannot recover for these, although the company may have been informed of the nature and character of the message. So, also, where the basis of the action is the negligence of the company in failing to deliver promptly the message requesting the addressee to meet the plaintiff at a station, damages are not recoverable for fatigue and exposure incident to the plaintiff's being compelled to walk from the station, nor for impairment of health resulting therefrom;⁴³ neither could the expenses for the hiring of a conveyance be recovered.⁴⁴ It was held, however, that if the operator knew that the sender was a woman, and the place to which the message requested the addressee to meet her was a flag station, the company is put on notice that a failure of the message being delivered will necessitate her walking, and it will be liable therefor, but not from sickness resulting from the fatigue and exposure to which she was subjected.⁴⁵

⁴³ *Stafford v. West. U. Tel. Co.*, 73 Fed. 273; *Yazoo, etc., R. Co. v. Foster*, 23 So. (Miss.) 587; *West. U. Tel. Co. v. Smith*, 76 Tex. 253, 13 S. W. 169.

⁴⁴ *West. U. Tel. Co. v. Smith*, 76 Tex. 253.

⁴⁵ *West. U. Tel. Co. v. Norton*, 62 S. W. (Tex.) 1081. See, also, *West. U.*

§ 531. Cipher or otherwise unintelligible messages.

From what has been said in the preceding section, the logical conclusion which naturally follows is, that, where a telegraph company receives a cipher message, or one otherwise unintelligible, and the nature and the purpose of which are only known by the sender and the addressee, the company will only be liable for nominal damages; or, at least, the price paid for its transmission, where it is negligently transmitted or delivered.⁴⁶ Some courts hold differently with respect to this subject,⁴⁷ but the greater weight of authority, both English and American, considers it as first stated.⁴⁸ As was said in discussing the general rule on this subject, when considering special circumstances connected with the contract of sending and which was not known by the contracting parties: "Had the special circumstances been known, the parties might have specially provided for the breach of the contract by special terms as to the damages in that case and of this advantage it would be very unjust to deprive

Tel. Co. v. Bryant, 17 Ind. App. 70; West. U. Tel. Co. v. Ragland, 61 S. W. (Tex.) 421; West. U. Tel. Co. v. Karr, 5 Tex. Civ. App. 60, 24 S. W. 302.

⁴⁶ Candee v. West. U. Tel. Co., 34 Wis. 471, 17 Am. Rep. 452.

⁴⁷ Dougherty v. American U. Tel. Co., 75 Ala. 168, 51 Am. Rep. 435; American U. Tel. Co. v. Dougherty, 89 Ala. 196; West. U. Tel. Co. v. Way, 85 Ala. 542; West. U. Tel. Co. v. Fatman, 73 Ga. 285, 54 Am. Rep. 877; West. U. Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; West. U. Tel. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715.

⁴⁸ Sanders v. Stuart, 1 I. C. P. D. 326, 17 Moak 286, 24 W. R. 949; Kinghorne v. Montreal Tel. Co., 18 N. C. Q. B. 60; Primrose v. West. U. Tel. Co., 154 U. S. 1; West. U. Tel. Co. v. Hall, 124 U. S. 444; West. U. Tel. Co. v. Coggin, (C. C. A.) 68 Fed. 137; Behm v. West. U. Tel. Co., 8 Biss. (U. S.) 131; Hart v. West. U. Tel. Co., 66

Cal. 579, 56 Am. Rep. 119; Fererro v. West. U. Tel. Co., 9 App. Cas. (D. C.) 455; West. U. Tel. Co. v. Wilson, 32 Fla. 527, 14 So. 1, 37 Am. St. Rep. 125, 22 L. R. A. 434; Postal Tel. Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474; West. U. Tel. Co. v. Martin, 9 Ill. App. 587; United States Tel. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519; Beaupre v. Pacific, etc., Tel. Co., 21 Minn. 155; Ables v. West. U. Tel. Co., 37 Mo. App. 554; Hughes v. West. U. Tel. Co., 79 Mo. App. 133; Melson v. West. U. Tel. Co., 72 Mo. App. 111; Mackay v. West. U. Tel. Co., 16 Nev. 222; McCall v. West. U. Tel. Co., 44 N. Y. Supr. Ct. 487; Com. v. West. U. Tel. Co., 100 N. Car. 300, 6 Am. St. Rep. 590, 6 S. E. 731; West. U. Tel. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; Ferguson v. Anglo-American Tel. Co., 178 Pa. St. 377, 35 Atl. 979, 35 L. R. A. 554, 56 Am. St. Rep. 770; Daniel v. West. U. Tel. Co.,

them.”⁴⁹ The unintelligible messages may and generally do relate to special circumstances not known by these companies, and to hold them liable for damages resulting from negligence in sending, and that which may not have entered into the contemplation of their minds at the time of accepting the message as being the natural and proximate result of such negligence, would be inconsistent with the spirit of the general rule. Some courts have held that this rule is analogous to, and derives its support from, the principle of the law of common carriers, which exempts them from responsibility where the owner conceals his goods so the nature, quantity and price of them are unknown to the carrier.⁵⁰ This is doubtless true, in a sense, but we think the fundamental principles of this rule, as well as that of carriers, are founded upon the reasons given in the cases which are universally recognized as authority on this subject.⁵¹ The only difficulty in these cases is in ascertaining the fact as to whether the company was informed of the nature and purpose of the message; and this, we shall now discuss.

§ 532. Same continued—case in point—reason of rule.

A reason for this rule was given by Chief Justice Dixon, from which we quote: “It cannot be said or assumed that any amount of damages or any pecuniary loss or injury will naturally ensue or be suffered, according to the usual course of things, from the failure to transmit a message, the meaning and import of which are wholly unknown to the operator. The operator who receives, and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect to which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a mere item of news or some other communication of trifling and unimportant character. Ignorant of its real nature and importance, it cannot be said to have been in his contemplation, at the time of

⁴⁹ Tex. 452, 48 Am. Rep. 305; *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715; *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452.

⁴⁹ *Hadley v. Baxendale*, 9 Exch. 341.

⁵⁰ *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452.

⁵¹ *Hadley v. Baxendale*, 9 Exch. 341.

making the contract, that any particular damage or injury would be the probable result of a breach of the contract on his part.”⁵² It is true that these companies must exercise as much care and diligence in the transmission of unintelligible messages as those which show the importance and urgency on their face, although they would know in one and not in the other the result of their dereliction and carelessness. It is one of the duties of these companies to refrain from divulging the contents of messages entrusted to their care; this is provided for by statutes in some states, and the operator who violates such may be subjected to a penalty. Therefore, if the company may be held liable for all damages resulting proximately and naturally from its negligence, when the message shows its importance and purpose on its face, whereby the company is informed of the probable results of its negligence; and if the secrecy of one is as safe as the other, it should be the duty of the sender to inform the company, in some way, of the importance of the message in order to hold it liable for damages to which it would not otherwise be subjected in case the message was unintelligible.

§ 533. Contrary view.

There are some very plausible reasons given by some courts for holding a contrary view on this subject. These courts hold that the company is liable for all damages resulting proximately and directly from the company's failure to transmit correctly or deliver promptly all messages delivered to it, whether they be intelligible or unintelligible to the company at the time they are accepted.⁵³ The ground on which they base their views is, that it is the duty of these companies to exercise as much care and diligence in the transmission of these kinds of messages as one whose importance is shown on its face, or where the information of this fact is otherwise given to them. Another reason entertained is, that most messages of great importance are written in cipher or otherwise unintelligible language. In other words, a large part of all messages of a commercial or business nature are sent in cipher, known only to the sender and addressee; and this fact suggests to the company that the damages resulting from its

⁵² *Candee v. West. U. Tel. Co.*, 34

⁵³ See note 47.

Wis. 471, 17 Am. Rep. 452.

negligence will be usually great, and that all these are supposed to have entered into the contemplation of the company's mind at the time the message was accepted, as would most probably be the natural and direct result of its carelessness or negligence. While these reasons appear at first sight as unanswerable, yet we feel that they are unsound.

§ 534. Same continued—information on face of the message.

As has been said, a great many messages of a business or commercial nature are sent in cipher, or language which is otherwise unintelligible to the company or its operator, and the only information the operator has of the importance and urgency of the message is such as is gathered from its face and the company should only be liable for nominal damages in negligently transmitting or delivering it.⁵⁴ Thus, the plaintiff, who had been offered a certain price for his interest in a certain oil well, telegraphed his agent this message: "Telegraph me at Rochester what that well is doing." This was not delivered for several days after it was sent. In the meantime, plaintiff went to Rochester, and not receiving any reply, sold his interest in the well for much less than it was worth. It was held that nominal damages could only be recovered. In delivering the opinion in this case the court said: "For all the purposes for which the plaintiff desired the information, the message might as well have been in a cipher or in an unknown tongue. It indicated nothing to put the defendant upon the alert, or from which it could be inferred that any special or pecuniary loss would ensue from a non-delivery of it."⁵⁵ In another case, the plaintiff's contracted with some parties in San Francisco to furnish three hundred Colt's revolvers. They were to receive a commission for their services and were bound to pay a penalty if they failed to perform their part of the agreement. They sent by the Pacific Mail Company to the agents at the place, \$1,000 to be used in their purchase, and sent the following message over the defendant's line to said agents: "Get one thousand dollars of the Mail Company." This message was, through the company's neg-

⁵⁴ See note 48.

⁵⁵ *Baldwin v. United States Tel. Co.*
L. N. Y. 744, 6 Am. Rep. 165.

ligence so long delayed that the contract could not be performed. It was held that the message did not show on its face its importance, and the plaintiff could only recover nominal damages.⁵⁶

§ 535. When message discloses its importance.

Although a message may be couched in unusual, or trade language, if it is sufficiently plain to indicate that it relates to business transaction of much importance, and that loss will probably result unless it is promptly transmitted and delivered, recovery will not be limited to nominal damages. Thus, it has been held that the following messages contain sufficient information on their face to indicate their importance: "Cover two hundred September, one hundred August."⁵⁷ This meant sell two hundred bales of cotton delivered in September and one hundred delivered in August. "Ten cars new two white August shipment, fifty-six half."⁵⁸ This was an offer to sell two cars of No. 2 white oats, to be shipped in August, at fifty-six and one half cents per bushel. "Sell one hundred Western Union. Answer price."⁵⁹ "Want your cattle in the morning; meet me at pasture."⁶⁰ It was held that this was sufficient to authorize the inference that a delay until the day following would result in confusion, and loss. "Ship your hogs at once." The court said: "The obvious reason of this is evidence on its face. It clearly imports that to meet a good market for hogs there must be shipment at once, and that by a delay a good market will be lost. It is equivalent to saying, if you ship at once you will obtain gains of the purchase and sale of your hogs. If you delay, these gains will be lost by the market price declining. It is most obvious, therefore, that the parties contemplated this very thing."⁶¹ "Ship cargo named at 90, if you can secure freight at 10." This was sufficient to inform the operator that this was an acceptance of an offer to sell a cargo at the price named, if freight could

⁵⁶ *Landsberger v. Magnetic Tel. Co.*, 32 Barb. 530.

⁵⁷ *West. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480.

⁵⁸ *West. U. Tel. Co. v. Harris*, 19 Ill. App. 347.

⁵⁹ *Tyler v. West. U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38.

⁶⁰ *Hadley v. West. U. Tel. Co.*, 115 Ind. 191.

⁶¹ *Manville v. West. U. Tel. Co.*, 37 Iowa 214, 18 Am. Rep. 8.

be procured at ten cents.⁶² "If we have and Old Sutherland on hand, sell same before board. Buy five Hudson at board."⁶³ "Will take two cars sixteens. Ship soon as convenient via West Shore." This was sent after the sender had received on the same day, through the same office a dispatch from Armour & Company, Chicago, containing these words: "Pickled hams, sixteens, nine and a half." In delivering the opinion the court, said: "We think the contents of this message were such as to indicate clearly to defendant that it was important, that a contract for the purchase of two carloads of hams was being made by the parties, and that a failure to send the message must result in such loss to the parties as would naturally follow from a failure to complete such contract."⁶⁴ "Buy fifty North Western—fifty Prairie du Chein, limit forty-five." This contained sufficient information on its face.⁶⁵ "Car cribs six sixty, c. a. f., prompt." This was sent in reply to the following: Quote cribs loose, and strips packed." In the meat trade, "cribs" means clear ribs, and "c. a. f." means cost and freight.⁶⁶ "You had better come and attend to your claim at once."⁶⁷ "Send a bay horse to-day, Mack loads to-night." Mack was a well-known horsebuyer who was in the habit of shipping horses from the vicinity of the place from which the message was sent.⁶⁸ The following was held against the great weight of modern authority as being insufficient: "Will take two hundred extra mess, price named." This was in reply to a message containing the following: "Extra mess, \$28.75."⁶⁹

§ 536. Same continued—need not be informed of all facts.

It is not necessary that the company be informed of all the facts and circumstances pertaining to the business transaction about which the message is sent, in order for this rule to hold good. It is enough

⁶² True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 156.

⁶³ Rittenhouse v. Independent Line of Tel., 44 N. Y. 263, 4 Am. Rep. 673.

⁶⁴ Mowry v. West. U. Tel. Co., 51 Hun 126.

⁶⁵ United States Tel. Co. v. Wenger, 55 Pa. St. 262, 93 Am. Dec. 751.

⁶⁶ Pepper v. West. U. Tel. Co., 87

Tenn. 554, 4 L. R. A. 660, 10 Am. St. Rep. 699.

⁶⁷ West. U. Tel. Co. v. Sheffield, 71 Tex. 570, 10 S. W. 752.

⁶⁸ Thompson v. West. U. Tel. Co., 64 Wis. 531.

⁶⁹ Beaupre v. Pacific, etc., Tel. Co., 21 Minn. 155.

if there are sufficient facts disclosed by the face of the message to indicate its importance, and the probable consequences of its failure in not being received by the addressee as delivered to the company.⁷⁰ A message containing these words: "Fifty-five cents, usual terms, quick acceptance," indicates that it relates to a business transaction and to a contemplated trade and puts the company on notice that it is of importance.⁷¹ Some courts have held that a message is sufficiently plain if its language is such as to put the company on inquiry.⁷² We hardly think that it is the duty of these companies to exert themselves to make any extensive inquiry of the nature and purpose of a message, when the language of such puts them on inquiry. However, if the facts could be ascertained by a little inconvenience on their part, it would be, in our opinion, their duty to make such inquiry. The nature of the business of these companies is to expedite matters in the greatest possible haste; so, to require them to ascertain facts concerning the nature and purposes of messages delivered, would necessarily destroy the effects of such a business.

§ 537. Question for jury.

There can be no fixed rule laid down by which a court may be guided in determining whether a message contains such words as will be sufficiently plain to indicate its importance. As was said, some courts hold that the company will not be limited to nominal damages for negligently transmitting or delivering a message, and that too, whether the company did or did not know the purpose of the message; but the weight of authority is undoubtedly to the contrary. Where there is doubt as to whether the words contained in the message were sufficient to indicate its importance, and whether this is true with respect to the operator, or whether the latter was made more certain of

⁷⁰ *Evans v. West. U. Tel. Co.*, 102 Iowa 219, 71 N. W. 219; *Harkness v. West. U. Tel. Co.*, 73 Iowa, 190, 5 Am. St. Rep. 672; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660; *Gulf, etc., R. Co. v. Loonie*, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891; *Manville v. West. U. Tel. Co.*, 37 Iowa 214, 18

Am. Rep. 8; *Garrett v. West. U. Tel. Co.*, 83 Iowa 257; *McPeck v. West. U. Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205, 43 L. R. A. 214, 78 N. W. 63.

⁷¹ *Fererro v. West. U. Tel. Co.*, 9 App. Cas. (D. C.) 455.

⁷² *West. U. Tel. Co. v. Carter*, 20 S. W. (Tex.) 834; *Thompson on Elect.*, § 365.

its importance by extrinsic facts, are questions for the jury.⁷³ The question as to the operator's having transmitted similar messages of whose importance he was informed, or the frequency with which familiar words are used, their familiarity in trade circles, and whether the same have been communicated to the company, are matters to be considered in determining their sufficiency. As said, no rule can be laid down for determining this question, but all facts and circumstances connected with the particular message should be considered. If the message is a summons for a physician, and the operator knows him to be such, it would not be a question for the jury, since it is sufficiently plain on its face to indicate its importance.⁷⁴ When the message announced the illness of some one, where the operator knew that the addressee was related to the person announced as ill;⁷⁵ or where the message directed the sender's attorney to attach property of a failing debtor; or advising the plaintiff of the fact that a debtor is about to fail or some similar facts⁷⁶ the message, in either case, will be sufficiently plain to indicate its importance, and the company will not be limited to nominal damages for its failure to transmit or deliver correctly and promptly. All damages which would ordinarily result from the lack of medical attention, or from mental suffering, or for the loss of a debt, may be recovered.

§ 538. Same continued—extrinsic facts of importance.

Where the message does not contain words sufficiently plain to indicate its importance, but there are extrinsic facts acquired by the company at the time the contract of sending is made which apprises it of the importance of the message, the company will be liable for a

⁷³ *Cannon v. West. U. Tel. Co.*, 100 N. Car. 300, 6 S. E. 731, 6 Am. St. Rep. 590; *Candee v. West. U. Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530; *Postal Tel. Cable etc., Co. v. Lathrop*, 131 Ill. 575, 7 L. R. A. 471, 19 Am. St. Rep. 55, 23 N. E. 583.

⁷⁴ *West. U. Tel. Co. v. Church*, 90 N. W. 878, 57 L. R. A. 905.

⁷⁵ *West. U. Tel. Co. v. Eakridge*, 7 Ind. App. 208; *West. U. Tel. Co. v.*

Pearce, 34 So. (Miss.) 152; *Meaders v. West. U. Tel. Co.*, 132 N. Car. 40, 43 S. E. 512; *West. U. Tel. Co. v. Wilson*, 51 S. W. (Tex.) 521; *West. U. Tel. Co. v. Linn*, 87 Tex. 7, 47 Am. St. Rep. 58.

⁷⁶ *Pacific Postal Tel. Cable Co. v. Fleischur* (C. C. A.) 66 Fed. 899, 35 Fed. 738; *Bierhaus v. West. U. Tel. Co.*, 8 Ind. App. 246; *Martin v. West. U. Tel. Co.*, 1 Tex. Civ. App. 143.

failure to send or deliver the message accurately and promptly, just the same as if it showed this fact on its face.⁷⁷ It is claimed by some authority,⁷⁸ that the extrinsic facts must have been acquired from the sender at the time the contract was made or prior thereto, if they were acquired after the making of the contract, they could not be considered as part of the contract. We are inclined to think it is necessary that they be known at the time of making the contract, else the company could not have contemplated the result of a failure to properly discharge its duty with respect to the message. The rule is that the resulting damages of the company's negligence must have entered into the contemplation of the parties' minds at the time the contract was made. We do not, however, think that the company is precluded from deriving the information from sources other than from the sender, but in determining the question, the court and the jury may ascertain whether the company was informed from other sources. In other words, all the facts and circumstances which have any reference to the acceptance of the particular message, should be considered in determining this question. When notice of the main facts is given, the company is chargeable with notice of every incidental fact that would attend the transaction, and such as could have then been ascertained by the most minute inquiry.⁷⁹ If the operator was in the habit of transmitting other messages for similar purposes, of the importance of which he had been informed, or if the sender was carrying on a certain kind of business and was accustomed to send similar messages in regard to such business over the company's lines, the latter is chargeable with notice of its importance, and any circumstances which tend to sustain these facts may be shown.⁸⁰ It has been held that the same rule will apply

⁷⁷ *McPeck v. West. U. Tel. Co.*, 107 Iowa 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205; *West. U. Tel. Co. v. Edsall*, 74 Tex. 329, 15 Am. St. Rep. 835; *West. U. Tel. Co. v. Williford*, 27 S. W. (Tex.) 700; *West. U. Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403; *Herron v. West. U. Tel. Co.*, 90 Iowa 129, 57 N. W. 976; *Sprague v. West. U. Tel. Co.*, 6 Daly (N. Y.)

200; *Rittenhouse v. Independent Line of Tel.* 44 N. Y. 263, 34 Am. Rep. 673.

⁷⁸ *Gray on Tel. Co.*, § 89.

⁷⁹ *West. U. Tel. Co. v. Edsall*, 74 Tex. 329, 15 Am. St. Rep. 835.

⁸⁰ *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55; *Mackay v. West. U. Tel. Co.*, 16 Nev. 227; *West. U. Tel. Co. v. Williford*, 27 S. W.

when the message is in cipher as if written in the English language.⁸¹

§ 539. Rule in "mental anguish cases."

The rule just discussed is not changed by the fact that the nature and purpose of the message relates to some object which, if not properly accomplished, will result in injury to the feelings of some one interested in the message. It is generally held that where a telegraph company fails to correctly and promptly transmit and deliver a message relating to the serious illness, death or burial of some one in whom the sender or addressee is interested, it will be liable in damages for the mental anguish suffered by either of these parties, if the company had information of the nature and purpose of such message.⁸² If the message does not contain words sufficiently plain on its face to apprise the company of such fact, and there is no extrinsic evidence imparted to the latter at the time of accepting the message to sustain such fact, the company will be liable only for nominal damages.⁸³ But, on the other hand, if the company is informed, either by the face of the message or by extrinsic evidence, that it relates to the dangerous illness, death or the time of the burial of a relative, or

(Tex.) 700; *Erie Tel., etc., Co. v. Grims*, 82 Tex. 89; *Roach v. Jones*, 18 Tex. Civ. App. 231, 44 S.W. 677; *West. U. Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539.

⁸¹ *West. U. Tel. Co. v. Hyer*, 22 Fla. 637, 1 Am. St. Rep. 222.

⁸² *Reese v. West. U. Tel. Co.*, 123 Ind. 294, 21 N. E. 163, 7 L. R. A. 583n; *Lynn v. West. U. Tel. Co.*, 123 N. C. 129, 31 S. E. 350; *Cashion v. West. U. Tel. Co.*, 123 N. Car. 267, 31 S. E. 493, 124 Ind. 459, 32 S. E. 746, 45 L. R. A. 160; *Burnett v. West. U. Tel. Co.*, 128 N. Car. 103, 38 S. E. 294; *Meadows v. West. U. Tel. Co.*, 8 Tex. Civ. App. 176, 27 S. W. 760; *West. U. Tel. Co. v. Randles*, 34 S. W. 447.

⁸³ *West. U. Tel. Co. v. Todd*, 22 Ind. App. 701; *West. U. Tel. Co. v. Pearce*,

34 So. (Miss.) 152; *Sherrill v. West. U. Tel. Co.*, 116 N. C. 655, 21 S. E. 429; *Cashion v. West. U. Tel. Co.*, 123 N. C. 267, 31 S. E. 493; *Darlington v. West. U. Tel. Co.*, 127 N. C. 448, 37 S. E. 479; *Sparkman v. West. U. Tel. Co.*, 133 N. C. 447, 45 S. E. 827; *Kennon v. West. U. Tel. Co.*, 126 N. C. 232, 25 S. E. 468; *Ikard v. West. U. Tel. Co.*, 22 S. W. (Tex.) 534; *West. U. Tel. Co. v. Womack*, 9 Tex. Civ. App. 607; *West. U. Tel. Co. v. Murray*, 26 Tex. Civ. App. 207; *West. U. Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760; *West. U. Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564; *West. U. Tel. Co. v. Smith*, 26 S. W. (Tex.) 216; *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026.

where it requests the addressee to come at once or some request of like import, the company will be liable for all mental suffering resulting proximately and directly from the failure to properly transmit or deliver the message.

§ 540. Same continued—relationship of person affected.

The above rule is considered further, in this, that the company must not only be informed that the message relates to the serious illness, death or the time set for burial of some one in whom the plaintiff is interested, but it must further be informed that the party about whom the message concerns is a near relative of his. This may either be imparted to the company by the face of the message, where the wording is sufficiently plain to indicate this important fact, or it may derive this information from extrinsic evidence alone, or in connection with the facts on the face of the message.⁸⁴ It seems that it is not as necessary for the face of the message to be plain and clear, with respect to a message of this character, and one of a business nature when written unintelligibly; but if there is any notice or information of its purpose, it becomes the duty of the company to make further inquiry.⁸⁵ While these companies must have some information of the relationship of the parties, yet it is not necessary that the exact relationship of the parties, or that the family pedigree, should be set out in the message, or even given to the company by outside information. The reason for the later view is the same as that given above in regard to the brevity in which messages should be prepared. The only apparent effect this would have, as said in regard to "repeating" a message, would be "to increase the revenue of these

⁸⁴ *Davis v. West. U. Tel. Co.*, 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371; *Bennett v. West. U. Tel. Co.*, 128 N. C. 103, 38 S. E. 294; *Meadows v. West. U. Tel. Co.*, 132 N. C. 40, 43 S. E. 572; *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843; *West. U. Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *West. U. Tel. Co. v. Feegles*, 75 Tex. 537, 12 S. W.

860; *West. U. Tel. Co. v. Moore*, 76 Tex. 66, 12 S. W. 949, 18 Am. St. Rep. 25; *West. U. Tel. Co. v. Rosentreter*, 80 Tex. 456, 15 S. W. 1089; *Potts v. West. U. Tel. Co.*, 82 Tex. 545, 18 S. W. 604; *West. U. Tel. Co. v. Nations*, 82 Tex. 539, 27 Am. St. Rep. 914; *West. U. Tel. Co. v. Carter*, 20 S. W. (Tex.) 834.

⁸⁵ *West. U. Tel. Co. v. Moore*, 76 Tex. 66, 18 Am. St. Rep. 25.

companies."⁸⁶ In a recent decision rendered in Texas, the rule seems to be that the company is charged with knowledge of the relationship of the parties by the mere fact of the nature of the message, where it is one relating to the serious illness, death or time of funeral, or the like.⁸⁷ "When such communication relates to sickness and death, there accompanies them a common-sense suggestion that they are of importance, and that the persons addressed have in them a serious interest."⁸⁸

§ 541. Same continued—reason of rule—nearness of relationship.

The reason of the rule that the relationship of the parties must be known by the company at the time the message is accepted, in order to recover damages for mental suffering, as the natural and direct result of its failure to discharge its duty, is obvious. No one can recover damages, as was said in the beginning of this chapter, unless his rights have been infringed upon, and then they are only given as a compensation for such infringement. It is true, that we grieve to hear of the serious illness or death of close friends, but it would be wholly and entirely foreign to sound reason to say that we would suffer the same pangs and untold grief at the death of a friend as we would to hear of the death of a member of one's family or closely of kin. It is only when this relationship exists, or is presumed to exist—which is a presumption all relatives in consanguinity bear—that the mind can become so impaired by suffering as to entitle the person to damages for such. In other words, there must be such an injury to the feelings or sufferings of mind, as can be, in a sense, measured by a pecuniary compensation, before the party can recover; and this is never presumed, except where the parties are closely related by blood. Therefore, if the message concerns some one who does not stand in this relation, the company will not be liable for damages caused by mental suffering, although it may be informed of its purpose. However, if the message concerns the dangerous illness, death

⁸⁶ West. U. Tel. Co. v. Tyler, 74 Ill. 70.

⁸⁷ West. U. Tel. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896; West. U. Tel. Co. v. Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 870; West. U. Tel. Co.

v. Smith, 9 Tex. 3, 33 S. W. 742; West. U. Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920.

⁸⁸ Id.

or time of burial of some one related to plaintiff, and it is affirmatively shown that there was a peculiar tenderness of relation existing between the parties, and the company is informed of this fact, it would be liable for mental suffering for negligently transmitting or delivering the message.⁸⁹

§ 542. Same continued—interest of the party in the transaction.

When the person is not a party to the message, but is greatly interested in the results, the company must be informed of his interest at the acceptance of the message in order to be held liable.⁹⁰ He is not a party to the contract, and only such damages can be recovered as result from the company's negligence in transmitting or delivering the message, and such as might have been presumed to have entered into the contemplation of the minds of the *contracting parties* at the time the contract was made. It is the result of the breach supposed to have been contemplated by the contracting parties, and not those entertained by some other, of whose existence the company would not likely be aware. If, however, the company is informed that the message concerns some person who is not a party to the message, it would be liable to him for the resulting damages just as if he were a party to the message; and, it matters not in what way it may derive this information.⁹¹ It seems, that the damages due a wife or husband for mental suffering are regarded as joint and either may maintain a suit for the recovery of same.⁹² Thus, it was held that the wife may recover for mental suffering caused by the failure of her relatives to meet her at a station and assist in caring for the body of her dead child, although the message was sent by her husband, and the company was not notified of her interest in the message.

⁸⁹ West. U. Tel. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896; West. U. Tel. Co. v. McMillan, 30 S. W. (Tex.) 298; West. U. Tel. Co. v. Garrett, 34 (Tex.) S. W. 649.

⁹⁰ Morrow v. West. U. Tel. Co., 107 Ky. 517; Driden v. West. U. Tel. Co., 54 S. W. 830; Southwestern Tel., etc., Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686; West. U. Tel. Co. v. Motley, 27 S. W. (Tex.) 51; West. U. Tel. Co.

v. Grigsley, 29 S. W. 406. Compare Landie v. West. U. Tel. Co., 124 N. C. 528, 32, S. E. 886; West. U. Tel. Co. v. Carter, 20 S. W. 834; West. U. Tel. Co. v. Russell, 31 S. W. 698.

⁹¹ West. U. Tel. Co. v. Evans, 5 Tex. Civ. App. 55, 23 S. W. 998.

⁹² Loper v. West. U. Tel. Co., 70 Tex. 689, 8 S. W. 600. See also Southwestern U. Tel. Co. v. Dale, 27 S. W. 1059.

§ 543. Same continued—deprived of the addressee's consolation.

This brings us to a question with peculiar features, that is, Whether or not damages may be recovered for mental suffering caused by one being deprived of the presence and consolation of some close relative, as the direct result of the company's dereliction of duty? In other words, can a person recover damages for mental suffering caused by the absence of some one who was deprived of being present with the former while in deep grief, the loss of whose consolation was the result of the company's negligence? It seems that if the company was informed that the person would suffer, or that the consolation of the addressee was the main purpose of the message, and without which great suffering would be endured, it would be liable for failing to discharge its duty; otherwise it would not be liable.⁹³ Thus, where the wife, who was at the deathbed of her husband, sent a telegram to her daughter, requesting the latter to come to her, the company would be liable to the daughter for damages caused by the mental suffering, where the message was delayed and she otherwise would have reached her father in time to have seen him before his death. But it would not be liable in damages to the mother for mental suffering caused by the want of the daughter's consolation, unless the company had knowledge that this would be the natural and direct result of its negligence.⁹⁴

⁹³ West. U. Tel. Co. v. Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 870; West. U. Tel. Co. v. Nations, 82 Tex. 530, 27 Am. St. Rep. 914. See al-

so West. U. Tel. Co. v. Burrow, 10 Tex. Civ. App. 122, 30 S. W. 378.

⁹⁴ West. U. Tel. Co. v. Luck, 91 Tex. 178, 66 Am. St. Rep. 869, 41 S. W. 469.

CHAPTER XXII.

MEASURE OF DAMAGES—CONTINUED—LOSS OF EXPECTED PROFITS ON SALES BY ERROR OR NEGLIGENCE IN TRANSMISSION.

§ 544. In general.

- 545. Sales prevented—plaintiff vendor—in general—legal sales.
- 546. Same continued—measure of damages.
- 547. Loss must be actual and substantial.
- 548. Orders for goods not delivered—in general.
- 549. Same continued—measure of damages.
- 550. Order for goods erroneously transmitted—purchaser's duty
- 551. Same continued—goods shipped to wrong place.
- 552. Same continued—stock, bonds, etc.
- 553. Messages directing agent to sell or purchase.
- 554. Same continued—order to close option to purchase.
- 555. Announcement of prices or state of market.
- 556. Contemplating shipping—delay in message—loss.

§ 544. In general.

It is our purpose to discuss at some length, in this chapter, the loss of expected profits in transactions or sales, caused by the negligence of telegraph companies in transmitting or delivering messages, and the means by which the amount of damage or loss sustained thereby may be ascertained. The negligence of telegraph companies may be the proximate cause of preventing contracts of sale from being consummated, or it may prevent a contract from being made at all whereby great substantial losses may be suffered; in either case, the company would be liable for all direct and proximate losses in the way of actual and substantial gains and profits which would be the natural result of same. The company is the agency or means by which the contracting parties are brought together, and its negligent act in transmitting or delivering the message containing an acceptance of a contract, would have the same effect as if it were a direct breach of the contract. A leading American authority, with respect to the measure of damages for a breach of a contract, holds: "The party injured by a breach of a contract is entitled to recover all his damages, including gains prevented, as well as losses sustained, provided they are certain and such as might naturally be expected to

follow from the breach. It is only uncertain and contingent profits, therefore, which the law excludes; not such as are the immediate and necessary result of the breach of the contract, which may be fairly supposed to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to the established market rates.”¹ This rule may be considered as the basis of the measure of damages which may have been incurred by reason of the company’s negligence.

§ 545. Sales prevented—plaintiff vendor—in general—legal sales.

It is often the case that parties who are at a distant place consummate certain sales by means of telegraph companies, and the subject-matter of the sale may be either at or near the place of the purchaser, and there to be delivered; or it may be where the vendor is and to be delivered to the former at some other place. Much depends in the sale on the accuracy and promptness of the company, since one small error on its part might be of serious injury to one of the contracting parties. It is always their duty to send the message in its exact language and as prepared by the sender, and deliver it as speedily as possibly. More especially is this the case where the message concerns sales or commercial transactions, which fact is often more or less made known to them by the character of the message. It is not meant, however that the rule applies to sales or commercial transactions of all kinds; it only applies to legal sales or transactions. As said in a former part of this work, telegraph companies were not incorporated to perpetrate crimes, or to carry on illegal transactions; their purposes are lawful, and only such can they be under any duty to perform. The object of the law is to prevent evildoers from carrying on their nefarious acts and misdoings; to be sure, the law would not create any being or institution whose object would be in direct conflict, and inconsistent with the principles of the law itself. So, it follows, that these companies would be under no obligation to discharge any act which was in itself illegal or immoral. No sale or transaction which showed on its face the illegality or immorality of the affair, or which was otherwise made

¹ *Griffin v. Calver*, 16 N. Y. 489, cited in 18 Am. Rep. 12.

known to the company, shall be considered within the scope of this chapter, but only such as are legal and moral in effect.

§ 546. Same continued—measure of damages.

The measure of damages which may be recovered from a telegraph company for negligently transmitting or delivering a message, whereby a sale has been prevented, is the difference between the price of the subject-matter of sale at the time it would have been sold, had it not been for such negligence, and the price the plaintiff is thereafter enabled to obtain therefor, after exercising reasonable diligence to make such latter sale,² together with expenses necessarily incurred in consequence of the delay or failure.³ In other words, if the plaintiff could have gotten a certain price for the thing to be sold at the time the message was delivered to the company, but was, after the negligence of the company in transmitting or delivering the message, only able to sell at a less price, and that by reasonable diligence; the measure of damages would be the difference between the two prices, together with the necessary expenses incurred in making the latter sale. The object of the law in such cases is to compensate the injured party as near as possible for the loss incurred. Thus, in a case where the words contained in the message were, "Ship your hogs at once," the message was delayed four days, and in consequence thereof the plaintiff had to keep his hogs four days longer than he would have done, thus incurring expenses for feeding, etc., and having to sell at a decreased price. It was held that he might recover the difference, at the place of delivery, between the market value of the hogs on the day when they would have been delivered had the message been delivered promptly and the market value on the

² West. U. Tel. Co. v. Lindley, 89 Ga. 484, 15 L. R. A. 36; West. U. Tel. Co. v. James, 90 Ga. 254, 16 S. E. 813; Evans v. West. U. Tel. Co., 102 Iowa 219, 71 N. W. 219; Herron v. West. U. Tel. Co., 90 Iowa 129, 57 N. W. 696; West. U. Tel. Co. v. Nye, etc., Grain Co., 97 N. W. (Neb.) 305; West. U. Tel. Co. v. Brown, 84 Tex. 54, 19 S. W. 336; West. U. Tel. Co.

v. Williford, 2 Tex. Civ. App. 574, 27 S. W. 700; Brooks v. West. U. Tel. Co., 72 Pac. (Utah) 499. Compare West. U. Tel. Co. v. Harman, 2 Tex. Civ. App. 100.

³ West. U. Tel. Co. v. Collins, 45 Kan. 88, 10 L. R. A. 575n, 25 Pac. 187; West. U. Tel. Co. v. Shumate, 2 Tex. Civ. App. 429; Lane v. Montreal Tel. Co., 7 U. C. C. P. 23.

day when the plaintiff was able to deliver them after the receipt of the message, together with the extra expense to which he was subjected.⁴ If there was any extra expense incurred in drayage, storage or transportation, or if he was out transportation or message fares or charges in consummating the last sale, this may be recovered. In other words, to brief the rule in one sentence, the plaintiff may recover the profits he would have reaped from the bargain had it been perfected. So, where the message concerns the sale and shipment of a earload of mules, and on account of the delay in the delivery of a message to the owner of the mules they were shipped on a subsequent day and sold at a reduction, he was allowed to recover the profit he would have made had the message not been delayed.⁵ It is not necessary that the profit should have been made out of the person first offering to buy, but if, on account of the company's negligence, the plaintiff was prevented from realizing it out of some other offering to buy at the same time for the same price, he may recover. Thus, if the plaintiff had been offered the same price for a certain number of bales of cotton by another cotton buyer, at the same time the message was delivered to the company offering the acceptance of the sale to a former bidder, but is prevented from consummating the last on the account of the negligent delay of the message, he may recover on account of the second sale.⁶ If the expense in any instance incurred in the second sale could have been avoided, it cannot be recovered,⁷ as only necessary expenses can be recovered.

§ 547. Loss must be actual and substantial.

We are again reminded of the recognized rule in the noted English case,⁸ when we come to consider the nature of the loss sustained in cases about which we are discussing in this chapter. That is that a loss sustained in a sale by reason of the negligence of a telegraph company in transmitting a message, respecting such sale, must be actual and substantial in order to be recovered. Not only is this fact sufficient, but a loss must be proven by competent evidence, because,

⁴ *Manville v. West. U. Tel. Co.*, 37 Iowa 214, 18 Am. Rep. 8.

⁵ *West. U. Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361.

⁶ *Postal Tel. Co. v. Rhett*, 33 So. (Miss.) 412; 35 Id. 829.

⁷ See note 2.

⁸ *Hadley v. Baxendale*, 9 Exch. 341.

while it may be presumed in certain cases that a telegraph company has been guilty of negligence, a loss will never be presumed by the mere fact of negligence on the part of the company.⁹ Thus, if the quantity of the goods to be sold is uncertain, or depends upon other contingencies, there can be no recovery of profits;¹⁰ or, if there is no evidence that the goods could or would have been shipped to him, if the message had been promptly sent and delivered, there can be no recovery.¹¹ The profits, in order to be recovered, must not be such as are classed with those which are purely speculative or conjectural; and more especially is this true when they relate to gambling transactions, since in no breach of a contract can any damages be recovered which are speculative or such as depend on the happening of some event which may never come to pass. They must be such as most reasonably would have been realized had the message been promptly transmitted and delivered, and not such as depended upon the hazards or chances of business.¹² Thus, if the profits to be realized depend on another sale which may or may not be made, or on the vendee's acceptance, or on another's judgment, or when the profits are conjectural or speculative, they cannot be recovered.

§ 548. Orders for goods not delivered—in general.

Not only can there be a recovery of all losses sustained in a sale by reason of the negligence of the company in failing to properly transmit a message pertaining thereto, but all gains in the purchase of goods, which may have been prevented for the same reason, may be equally recoverable. As was said, many sales are consummated by means of telegraphic communication, and there cannot, of course, be

⁹ *Pennington v. West. U. Tel. Co.*, 67 Iowa 631, 56 Am. Rep. 387; *Mickelwait v. West. U. Tel. Co.*, 113 Iowa 177. Compare *Alexander v. West. U. Tel. Co.*, 67 Miss. 386, 7 So. 280.

¹⁰ *Kingdom v. Montreal Tel. Co.*, 18 N. C. A. B. 60.

¹¹ *Meggett v. West. U. Tel. Co.*, 69 Miss. 198, 13 So. 815; *Cahn v. West. U. Tel. Co.*, 46 Fed. 40.

¹² *West. U. Tel. Co. v. Hall*, 124 U.

S. 444; *Cohn v. West. U. Tel. Co.*, 46 Fed. 40, affirmed (C. C. A.), 48 Fed. 810; *Beaupre v. Pac., etc., Tel. Co.*, 21 Minn. 155; *Reynolds v. West. U. Tel. Co.*, 81 Mo. App. 223; *Kiley v. West. U. Tel. Co.*, 39 Hun (N. Y.) 158; *Cannon v. West. U. Tel. Co.*, 100 N. Car. 300, 6 Am. St. Rep. 590; *Reliance Lumber Co. v. West. U. Tel. Co.*, 58 Tex. 395, 44 Am. Rep. 620.

a sale without a purchase. While in a sale of goods both parties, as a general rule, are equally benefited, one parts with his goods without injuring his trade and receives in lieu thereof their money's worth, while the purchasing party could hardly carry on his business without the particular goods. So, they are both about equally benefited, so long as the price of the commodities do not change; and it is this fact—the fluctuating prices—which causes the one to gain and the other to lose. In other words, if the owner of the goods is prevented, by any cause, from selling on one day, and the price of the goods goes up the next, when he does sell, there is a gain on his part, but a loss on the part of the purchaser. So, if there is an order made by means of a telegram but the same is, through the company's negligence, not sent or is delayed in delivery an unusually long time, during which the price of goods goes up, the purchaser would most certainly be damaged. In other words, he would have gained in the purchase of the goods had it not been for the negligence of the company; but the question in this instance is, By what method or means can the amount of damages be ascertained?

§ 549. Same continued—measure of damages.

The measure of damages in cases where the purchaser of goods or property fails to obtain them at the price he otherwise would have done had the message been properly and promptly delivered to the vendor, is similar to that in ascertaining the amount to be recovered in those cases where a loss has been sustained by the failure of a sale being consummated, except it is, in form, reversed. To be more explicit, the measure of damages to be recovered for a loss sustained by the failure of the company to promptly transmit and deliver a message, which contains an order for goods, is the difference between the price of the goods at the time and place the message should have been delivered, and the price which was paid for the same goods, at the same place, by another order, presented within a reasonable time after it has been learned, through due diligence, that the first was not delivered.¹³ The same rule will apply if the order was delayed in

¹³West. U. Tel. Co. v. Way, 83 Ala. 542, 4 So. 844; West. U. Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; West. U. Tel. Co. v. Harris, 19 Ill. App. 347; Squire v. West. U. Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; Dodd

the delivery an unreasonable time.¹⁴ That is, the measure of damages would be the difference between the price of goods at the time the order should have been delivered by reasonable diligence on the part of the company, and the price of the same goods at the time the order was delivered. It must be understood, however, that if the delay was the result of some uncontrollable power, such as atmospheric hindrances or the act of the public enemy, and not that of the company's negligence, it would not be liable for these losses. It is, nevertheless, the presumption that the negligence of the company was the cause of the loss, and the burden rests upon the latter to overcome this presumption. It has been attempted to be shown that not only should the difference in these two prices be recovered, but, in addition to this, the profits which would have been probably realized in a resale of the goods should also be recovered. It is generally held, however, that this loss is entirely too remote and speculative;¹⁵ but if there has been a resale of the goods effected or agreed upon, whereby a profit would have been realized then this also can be recorded, as this is not depending upon any unreasonable conditions.¹⁶ In connection with this statement, it has been held that if the order contained both an order to buy and sell, the losses which would have been sustained on the purchase order must be deducted from the profits he would have made on the sale order, in determining the measure of damages. So, the latter rule applies where

Grocery Co. v. Tel. Cable Co., 112 Ga. 685, 37 S. E. 981; *Turner v. Hawkeye, etc., Tel. Co.*, 41 Iowa 458, 20 Am. Rep. 605; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Mowry v. West. U. Tel. Co.*, 51 Hun (N. Y.) 126; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751; *Gulf, etc., R. Co. v. Loonie*, 82 Tex. 323, 27 Am. St. Rep. 891; *Carver v. West. U. Tel. Co.*, 31 S. W. (Tex.) 432.

¹⁴ *West. U. Tel. Co. v. Carver*, 15 Tex. Civ. App. 547; *Pearsall v. West. U. Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662, affirming 44 Hun (N. Y.) 532.

¹⁵ *West. U. Tel. Co. v. Fellner*, 58 Ark. 29, 41 Am. St. Rep. 81; *West. U. Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. St. Rep. 136; *Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Hibbard v. West. U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *West. U. Tel. Co. v. Hall*, 124 U. S. 444.

¹⁶ *West. U. Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. 336; *Walden v. West. U. Tel. Co.*, 105 Ga. 275, 31 S. E. 172; *West. U. Tel. Co. v. Landis*, 12 Atl. (Pa.) 467; *Postal Tel. Co. v. Rhett*, 33 So. (Miss.) 412, 35 So. 829; *West. U. Tel. Co. v. J. A. Kemp Grocer Co.*, 28 S. W. 905; *West. U. Tel. Co. v. Thomas*, 1 Tex. Civ. App. 105.

the party on whom the order is made does both the buying and selling by the authority given in the message, and not where the sender, as in the first rule stated above, accomplishes the resale. To recover in any instance, the plaintiff must prove that the addressee of the delayed or unsent message, containing the order, would have filled it, since if there was a doubt of this fact which had not been overcome by evidence, he could only recover nominal damages.¹⁷ All necessary expenses incurred in the transaction can be recovered in these cases the same as where a sale was prevented from being made by the negligence of the company.

§ 550. Order for goods erroneously transmitted—purchaser's duty.

The preceding paragraph referred to the measure of damages for losses sustained by the company's negligence in not sending, or delaying a message sent, containing an order for goods: so we shall, in this section, speak of the losses sustained by reason of the company erroneously transmitting the order contained in the message, and the measure of damages to be recovered therefor. It is as much the duty of these companies to transmit a message accurately and in the exact words in which it is prepared by the sender, as it is to promptly transmit and deliver the same. While it may require more exertion and a greater degree of care on the part of the company to transmit a message than it does in the promptness of sending or delivery, yet the duty imposed upon it is the same in either instance. In other words, it requires a complete performance of both of these before its full and entire duty has been complied with, since it would be a useless matter on the part of the sender to require a proper discharge of one of these duties without imposing upon the company the obligation of performing the other. Very often, orders for goods, sent by means of telegrams, are erroneously transmitted, and when received by the addressee they show on their face items which call for a greater or less quantity than ordered by the sender. When the latter is injured thereby, the question is, What loss has he suffered.

¹⁷ *Meggett v. West. U. Tel. Co.*, 69 Miss. 198, 13 So. 815; *West. U. Tel. Co. v. Burns*, 70 S. W. (Tex.) 784.

and what is the measure of damages to be used in recovering such loss? The general rule is, that where a message is erroneously transmitted, whereby an excess of goods has been ordered, the measure of damages is the difference between the market value of the excess, at the place of shipment, and that at the place to which they were shipped.¹⁸ Thus, if an order is for 5,000 sacks of salt, but the order as received calls for 5,000 casks, the amount to be recovered, when the salt has depreciated in value at the place to which it is shipped, is the difference between the market value of the excessive quantity of salt at the place of purchase and that at the former place, together with the expense of transporting the excessive amount.¹⁹ If the goods are perishable and become of no value, the measure of damages would be the value of the excess of goods at the place of shipment, together with the expense in transportation.²⁰ While the purchaser should exercise reasonable diligence to make the loss as light as possible, it seems that it is not his duty to transport them to a more favorable place for sale than that at which they happen to be;²¹ nor is it his duty to reship them to the place where they were purchased.²² But if he should decline to accept the excess of goods and they are shipped back to the vendor, he may recover the expense incurred in the transportation both ways and the depreciated value of the goods, if such has been the case.²³ If the message erroneously calls for a less amount of goods than was ordered, the measure of damages will be the same as in those cases where the company negligently failed to transmit the order, or where it was unreasonably delayed in delivery.

§ 551. Same continued—goods shipped to wrong place.

Errors of message, in not correctly transmitting the amount as ordered, is not necessarily the only manner in which loss may occur,

¹⁸ *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *New York, etc., Printing Tel. Co., v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 328; *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt (Va.) 122.

¹⁹ *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446.

²⁰ *Elsey v. Postal Tel. Cable Co.*, 15 Daly (N. Y.) 58.

²¹ *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446.

²² *West. U. Tel. Co. v. Reid*, 83 Ga. 401; *West. U. Tel. Co. v. Stevens*, 16 S. W. (Tex.) 1095.

²³ *Bowen v. Lake Erie Tel. Co.*, 1 Am. L. Reg. (Ohio) 685.

but a loss may be sustained by the message misstating the place to which such goods are to be shipped. The measure of damages, in such cases, is the difference between the price of the goods which could have been obtained at the place to which they would have been shipped, had it not been for the error made in the telegram, and the market value or best obtainable price at the place to which they were actually sent.²⁴ He should also be allowed to recover any necessary extra expenses incurred in the way of accomplishing a sale at the latter place. And if the transportation charges to this place were greater than those to the place they were ordered to be sent, the difference between the two should be recovered; but if, on the other hand, they were less, then this difference should be deducted from the total amount sustained in the loss. It will be seen by this that the purpose of the law, where the company only negligently discharged its duty, is to only compensate the injured party for his loss; where the act was maliciously done to injure his trade or business, the rule is different.

§ 552. Same continued—stock, bonds, etc.

We have been, heretofore, discussing the means of ascertaining the amount of recoverable damages sustained in losses caused by telegraph companies erroneously transmitting orders for goods. Where the order is not for commodities, but for stocks, bonds and other like securities, the measure of damages is different, yet the principle on which they are founded is the same. The cause of this is that the nature of the property and the uses to which it may be put, are different. If an order for stocks, bonds or other like securities has been erroneously transmitted, the measure of damages is the loss, if any, sustained by the purchaser in consequence of the error in transmission.²⁵ In other words, if the order is changed so as to call for a kind of stock other than that ordered, the injured party may recover the difference in the price of stock it was desired to purchase, at the time the order was made, and the price to which it had advanced

²⁴ West. U. Tel. Co. v. Reid, 83 Ga. 101; West. U. Tel. Co. v. Stevens, 16 S. W. (Tex.) 1095.

²⁵ West. U. Tel. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

at the time the error was made, also the amount of the loss on the other stock.²⁶ Where there is a profit which would have been larger had the message been correctly transmitted, the decrease in the profits realized may be recovered. Thus, where an order for 1,000 shares of certain stock was changed in the transmission so as to read 100 shares, and before the error was discovered the stock had advanced, it was held that the plaintiff could recover the amount of the advance in the price of 900 shares up to the time he became aware of the error, but not for advances occurring thereafter.²⁷

§ 553. Messages directing agent to sell or purchase.

Where a person directs or orders his agent, by means of a telegram, to sell certain property, but on account of an inexcusable delay in the delivery of the message the person loses by a decline in the price of the property, the measure of damages is the difference between the price at which the same was sold and that which he would have received, had it not been for the delay.²⁸ In such cases, however, the injured party must exercise reasonable diligence to make the loss as light as possible, which may be done by the sending of another order for the sale as soon as possible after he learns of the delay.²⁹ One difficulty which arises under cases of this kind is, whether the property ordered to be sold was ever in the actual possession of the sender or the injured party. Many transactions for the sale or purchase of property is carried on under what is known as "future" sales or purchases; and where the contract of sale made by telegram is for the sale or purchase of "futures," loss sustained by a message in respect to same, being either negligently transmitted or delayed in delivery, cannot be recovered because the law decrees

²⁶ *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673.

²⁷ *Marr v. West. U. Tel. Co.*, 85 Tenn. 529.

²⁸ *Dougherty v. American U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435, 18 So. 419; *Hocker v. West. U. Tel. Co.*, 34 So. (Fla.) 901; *Hadley v. West.*

U. Tel. Co., 115 Ind. 191; *West. U. Tel. Co. v. Littlejohn*, 72 Miss. 1025, 18 So. 418; *West. U. Tel. Co. v. Stevens*, 16 S. W. (Tex.) 1095.

²⁹ *Dougherty v. American U. Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435, 18 So. 419.

such contracts illegal. Before a legal sale can be made there must be in one party to the contract possession of the thing to be sold, and to complete same the party must be able to deliver the same. There cannot be a sale of something of which the intended seller has not possession, and of course, if he cannot deliver that which he did not either sell or have to sell, there cannot be a sale. Thus, where it appears that the plaintiff's agent had neither money nor stock in his hands belonging to the former, and no sale or purchase was made, although the agent testified that he would have loaned plaintiff the money if the message had been received in time, and although the agent of the company was familiar with the nature of such transactions, the damages sustained by a decline in the price of the stock during the delay of the message are too remote and speculative.³⁰ If possession is once had by the party selling purchases and sales of stock, it matters not how rapidly and often made, if delivery is contemplated, is not dealing in "futures," within the prohibition of the statutes.³¹

§ 554. Same continued—order to close option to purchase.

Where a person has an option to purchase certain property, and a message, which is delivered to a company, containing an order to his agent to close such option is delayed through the negligence of the company until after the expiration of the time within which the purchase was to have been made, the measure of damages, where there is a loss, is the difference between the price fixed by the option and the market price at the same place on that day.³² If, however, the market is less than that fixed in the option, and this is greater than the amount forfeited by the failure in not closing the option, there can be no recovery, as there is no loss. In order to hold the company liable, in either instance, the message must have been delivered to the company within a reasonable time before the closing of the option, to have given ample time for its delivery to the agent, and to have accomplished its purpose.

³⁰ *Cohen v. West. U. Tel. Co.* (C. C. A.), 48 Fed. 810, affirming 46 Fed. 40.

³¹ *West. U. Tel. Co. v. Littlejohn*, 72 Miss. 1025, 18 So. 413.

³² *Brewster v. West. U. Tel. Co.*, 65 Ark. 537, 47 S. W. 560; *West. U. Tel. Co. v. Bell*, 24 Tex. Civ. App. 572, 59 S. W. 918.

§ 555. Announcement of prices or state of market.

It is the general rule, as stated elsewhere, that where the owner of certain property makes an offer, in response to the announcement of the market price by means of a telegram, to sell at a certain price, and the message has been changed in its transmission so as to make the price less than that offered, the sender is bound to the receiver, who purchases the property, for the price as shown in the message received. The owner of the property may, however, where he relies on the announcement of the price or the state of market, as received from his agent, hold the company liable for the loss he has sustained by reason of the misquoted prices. In other words, if he receives a message from his agent stating the price at which the property can be sold, but the price as delivered to the company is really less than that quoted in the received message, and he sells on the strength of the latter price, believing it to be the state of the market, he may recover for the loss; and the measure of damages is the difference between the price the property actually sold for and that which he thought he was getting for it, or, as stated in another way, the amount of his actual loss caused by the decrease in the price he obtained.³³ It is held in these cases that the announcement must have been made in contemplation of a trade, and by some one acting with authority to make such announcement.³⁴ If the party to whom the announcement is made should be the purchaser, the measure of damages would be the increase in the price he was obliged to pay in consequence of the error.³⁵

§ 556. Contemplating shipping—delay in message—loss.

There are so very many cases arising from the negligence of telegraph companies in delaying the delivery of a message that it is

³³ West. U. Tel. Co. v. Crawford, 110 Ala. 460, 20 So. 111; West. U. Tel. Co. v. Flint River Lumber Co., 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; Postal Tel. Cable Co. v. Schaefer, 62 S. W. 1119, 23 Ky. L. Rep. 344; Reed v. West. U. Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; West. U. Tel.

Co. v. Richman, 8 Atl. 171; Pepper v. West. U. Tel. Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699.

³⁴ Frazer v. West. U. Tel. Co., 84 Ala. 497, 4 So. 831.

³⁵ West. U. Tel. Co. v. Dubois, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4.

difficult to enumerate them all and to give the measure of damages in each case. He who contemplates bringing suit should ascertain from the cases already cited the measure of damages to be recovered in his particular case, since the principle in all is the same, but only differently applied. Thus, if a party who contemplates making a shipment of live stock to a certain place on the announcement of the price at that place, but in consequence of a delay in the delivery or non-delivery of the price he ships to another less advantageous point, the measure of damages would be similar to all those cases heretofore discussed. In these particular cases it has been held that the measure of damages would be the difference in price at the place he actually shipped and that to which he would have shipped had the message been delivered in time, together with the difference, if any, between the transportation to the two places.³⁶ If, on the other hand, the message is one advising the owner of the stock not to ship and, through the delay in the message, he does ship, thereby encountering an unfavorable market, the measure of damages is the difference between the price of the stock at the place from which they were shipped and the price at the place to which they were shipped, together with expenses in transportation and that accruing in the sale.³⁷ In all cases where the owner suffers a loss by the negligence of these companies, he must exercise reasonable diligence to reduce his loss as much as possible. Thus, in the last rule given above, if the owner of the stock cannot sell at the place he has shipped, it is his duty, if practicable, to ship to the nearest good market in order to reduce his loss.³⁸ He need only exercise reasonable diligence and effort, and is not under obligation to seriously incommode himself or cause injury to his other business to make such reduction. If the message has never been delivered, and the addressee, under the circumstances, believes that there is no change in the market and buys accordingly

³⁶ West. U. Tel. Co. v. Collins, 45 Kan. 88, 10 L. R. A. 515, 25 Pac. 187; West. U. Tel. Co. v. Stevens, 16 S. W. 1095; Turner v. Hawkeye Tel. Co., 41 Iowa 458, 20 Am. Rep. 605.

³⁷ West. U. Tel. Co. v. Linney, 28 S. W. 234; West. U. Tel. Co. v. Woods,

56 Kan. 737, 44 Pac. 989. See also West. U. Tel. Co. v. Reid, 83 Ga. 401.

³⁸ West. U. Tel. Co. v. Woods, 56 Kan. 737, 44 Pac. 989. Compare Leonard v. New York, etc., Tel. Co., 41 N. Y. 544, 1 Am. Rep. 146.

at the last rates communicated to him, he may recover the difference between the excessive price he pays for the property and the price he would have paid had the message been delivered in time.³⁹ But if he should get the same information the delayed message would have given, from other sources and before he buys, he cannot recover anything.⁴⁰

³⁹ Garrett v. West. U. Tel. Co., 92 Iowa 449, 58 N. W. 1064, 60 N. W. 644.

⁴⁰ Reynolds v. West. U. Tel. Co., 87 Mo. App. 223.

CHAPTER XXIII.

MEASURE OF DAMAGES—CONTINUED—LOSS OF EMPLOYMENT, ETC.

§ 557. In general.

558. Loss of situation or employment.

559. Same continued—actual damages.

560. Same continued—circumstances tending to reduce loss.

561. Loss of professional fees.

562. Same continued—losses of otherwise professional nature.

563. Same continued—such as not recoverable.

564. Losses which might have been prevented.

565. Same continued—must show same would have been prevented.

566. Failing debtor—messages from creditors regarding same.

567. Failure to transmit money.

§ 557. In general.

The failure on the part of a telegraph company to properly discharge its duty towards the public, subjects it to as many and almost the same kind of actions as may be maintained against individuals for their wrongful acts. In fact, they are nothing more than persons in law, so considered by all the courts, and, with certain peculiar exceptions, their duties and liabilities toward the public are the same. One of the inalienable rights of every citizen is to own property and to make and enter into contracts in respect thereto. Any interference by another, except by due process of law, whereby he is prevented from exercising his authority over such, will subject the wrongdoer to damages. These companies may also own all property necessary for them to carry on and perform those objects for which they were incorporated. They may make and perform contracts, both with other corporations, and with individuals with respect to such property, so far as it may be necessary to accomplish their corporate objects, and any interference in these contractual rights may be remedied by proper actions. We propose to discuss in this chapter, the interference with contracts made or in contemplation of being made by individuals, or such as may have been prevented from being made by the negligence of telegraph companies. And first, we

shall speak of the loss of a situation or employment, which is the result of the company's negligence in delaying a message.

§ 558. Loss of situation or employment.

When a telegraph company, through its negligence, delays a message resulting in a loss of a situation or employment, it is not such an interference with the making of a contract as is meant when some third person intentionally interferes with the contracting parties in the making of a contract, and for which an action in tort may be maintained. In the latter cases, the gist of the action is the wrongful or malicious intent on the part of the wrongdoer; in the former it is not the intent which the company may have that makes out the case, but it is a failure to discharge its duties toward the public and the contracting parties. It is true that this negligence of the company may become so gross as to place them under the same class of cases—that is, a malicious interference. We shall not speak here of the wrongful or malicious intent which may have been entertained by the company when such negligence is perpetrated, but only of its negligence in the delay of the message and the results thereof. When a contract of employment or for a situation has been lost by the delay of a message, the injured party is surely entitled to damages; but the question, difficult of comprehension is, What is the measure of damages in such cases?

§ 559. Same continued—actual damages.

In cases where the plaintiff loses an employment in consequence of the company's negligent delay in delivering a message, the amount of damages to be recovered should be such as he has actually sustained.¹ It is not an easy matter to always ascertain what are the actual damages. In viewing this subject, the circumstances involved must be considered; the character of the employment; the ability of the plaintiff to perform such work; and the duration of the time he is to be engaged are matters to be considered.² And he should

¹ West. U. Tel. Co. v. Valentine, 18 Ill. App. 57; West. U. Tel. Co. v. McKibben, 114 Ind. 511; McGregor v. West. U. Tel. Co., 85 Mo. App. 308.

² West. U. Tel. Co. v. Hines 96 Ga. 688, 23 S. E. 845, 51 Am. St. Rep. 159; West. U. Tel. Co. v. Fenton, 52 Ind. 1; Kemp v. West. U. Tel. Co.,

prove the damages he has actually sustained by the delay. Thus, if his employment is for a certain specified time, during which he is to obtain a certain salary, the loss of this is the amount to be recovered;³ unless there are circumstances which would reduce this amount. In other words, if he is employed for one month at a salary of \$100, and his board for that time, but is prevented from making this through the negligence of the company, he may recover this amount. It is not only of a situation or an employment where he may have a right to recover; but if he has been prevented from accepting a contract to build a certain structure, or any other similar purpose, he may recover the actual loss sustained thereby.⁴ In these latter cases, it is more difficult to ascertain the exact damage sustained. It is the general rule, that the amount to be recovered is the net profit he would have made by performing the contract had he not been interfered with by the acts of the company. It must be understood that the gist of the action, in such cases, is not the interference with the contract made between the sender and the addressee of the message by the company's negligence, but it is the company's failure to carry out its contract made with one of these parties in respect to such contract; that is, to act as agent in bringing the minds of these two parties together with reference to the contract to be made by them as it contracts to do in accepting compensation for the delivery of the message.

28 Neb. 661, 44 N. W. 1064, 26 Am. St. Rep. 363, 30 Am. St. Rep. 607; *Wolfskehl v. West. U. Tel. Co.*, 46 Hun (N. Y.) 542. See also *Baldwin v. West. U. etc., Tel. Co.*, 93 Ga. 692, 21 S. E. 12, 44 Am. St. Rep. 194, compare *Jacobs v. West. U. Tel. Co.*, 76 Miss. 278, 24 So. 535.

³ *Mondon v. West. U. Tel. Co.*, 96 Ga. 499, 23 S. E. 853.

⁴ *West. U. Tel. Co. v. Robinson*, 29 S. W. 71; *West. U. Tel. Co. v. Bowen*, 84 Tex. 476. In this case, plaintiffs were threshers and their agent at X wired them, "Have 30,000 bushels for

you, if you can come at once." Plaintiffs answered, "Will ship machinery at once." This latter message was not delivered and the parties for whom the threshing was to be done, not knowing that the offer was accepted, employed other contractors. It was held that the company was liable, although there was no delay in getting the machinery to V; that complainant, being able to show the amount of grain to be thrashed and the rate of toll per bushel contracted for, the damages claimed could not be considered contingent, uncertain, or speculative.

§ 560. Same continued—circumstances tending to reduce loss.

It is the general rule, where a person is prevented from performing or carrying out a contract, and where he has not been guilty of any fault on his part, that he should exercise reasonable diligence to minimize the loss as much as possible; this may be done by performing other similar contracts. Thus, where he has lost a situation or employment, it is the duty of the plaintiff to seek other employment, by means of which the loss would naturally be reduced.⁵ But if he has a certain occupation or avocation, he need not seek employment in other lines of business.⁶ In other words, if he is a contractor, he need not endeavor to reduce the loss sustained by the acts of the company by engaging to farm or clerk, or any business outside that of a contractor. It is not necessary, in any particular, that he should exercise every endeavor to obtain other similar employment, but it is only his duty to exert reasonable diligence. If he has obtained other employment, the measure of damages for the loss sustained by a failure to perform the first is the difference between what he would have made had the message been delivered in time and the amount received in the latter employment. If, on the other hand, he has been unable to get other employment, he should recover all the loss actually sustained by a failure to perform caused by the delay of the message. That is, all that would have been made from the time the contract was made and the time it would have expired; and he should not be allowed to recover such claim as might likely accrue after the filing of the suit.⁷

§ 561. Loss of professional fees.

The same rule, which has just been discussed, applies to cases where a professional fee has been lost by a negligent delay in a mes-

⁵ *Moody v. Leverich*, 14 Abb. Pr. (U. S.) 154; *Worth v. Edmonds*, 52 Barb. 42; *Gillis v. Space*, 63 Id. 182.

⁶ *Perry v. Dickerson*, 7 Abb. N. C. 471; *Strause v. Miertief*, 64 Ala. 308; *Taylor v. Bradley*, 4 Abb. App. Dec. 377; s. c. 39 N. Y. 141; *Tufts v. Plymouth Gold M. Co.*, 14 Allen, 413; *Costigan v. Mohawk & H. R. R. Co.*, 2 Denio (N. Y.) 609, 43 Am. Dec. 758.

employment. *West. U. Tel. Co. v. The burden is on the company to show that the plaintiff could obtain other* *Brown*, 37 So. (Ala.) 493. It is a question for the jury as to whether a contract had been made. *Id.*

⁷ *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661; *West. U. Tel. Co. v. McKibben*, 114 Ind. 511.

sage. Thus where a message summoning a physician to visit a member of the family who is sick, or where it is a request for an attorney to attend a case, and the message is negligently delayed whereby the fees for such services are lost, the actual damages sustained thereby should be recovered. It is very often the case, that professional men have been deprived of fees they otherwise would have obtained had it not been for the company's negligence; and the measure of damages, in such cases, is the amount of fees they would have received, less the amount of fees made while not fulfilling such engagement, and also the extra expenses which necessarily would have been incurred had the services been rendered.⁸ Thus, in a case where a message was delayed summoning a physician to make a visit, it was shown that he would have made \$500 had the message been delivered in time and the visit made. The court held that this amount was recoverable, less other fees made during the time he would have been gone. We think that railroad and other similar expenses incurred in making the trip, should also be deducted from the amount of fees which would have been made.⁹ In any of these cases, the company must have had some information of the character and purpose of the message, in order to have been liable. In these, as in all other cases heretofore discussed, all the damages may be recovered which entered into the contemplation of the parties' minds, at the time the contract of sending was made, as would be the natural and probable results of a breach of such contract; and, unless the company should have had some information of the purpose of the message, such contemplation could not have been entertained by it.¹⁰

⁸ *West. U. Tel. Co. v. McLaurin*, 70 Miss. 26, 13 So. 36 (Attorney's fee); *Fairley v. West. U. Tel. Co.*, 73 Miss. 6, 18 So. 796 (loss of fee to physician). See also *Mood v. West. U. Tel. Co.*, 40 S. Car. 524; *West. U. Tel. Co. v. Longwill*, 5 N. Mex. 308, 21 Pac. 339.

⁹ *West. U. Tel. Co. v. Longwill*, 5 N. Mex. 308, 21 Pac. 339.

¹⁰ *West. U. Tel. Co. v. Clifton*, 68 Miss. 307, 8 So. 746. In this case, a

party at W. telegraphed to his attorney to meet him there to arrange an assignment. The attorney replied that he would come at once, but this latter message was not delivered, and the party secured a local attorney and plaintiff lost the expected fee. The only information the company had of the circumstances was from the message which read, "Sent Eckford on first train. Am here. Answer." and a reply to the effect that E. would come

§ 562. Same continued—losses of otherwise professional nature.

While people, carrying on a business of a special and particular nature, do not, strictly speaking, fall in the class of professional men, yet their business, being somewhat similar, the above rule may, however be applied to them. Thus, where a person is acting in the capacity of a detective, and is trying to capture a criminal, for whose capture there is a reward, he may recover of the company an amount of damages equal to the reward offered, when he has been prevented from making such capture by the company's negligence in delaying a message containing facts of his whereabouts.¹¹ Where a real estate agent has failed to make his commission in a sale of real estate by reason of the message being negligently delayed, the commission may be recovered.¹² It was held in one case, that the fact of the non-delivery of a message in time to enable the party to whom it was sent to meet a train and comply with the directions of the sender, does not cause the former party to suffer any damage; but simply to lose a mere opportunity or possibility to make some money, and the company therefore, is not liable to him in damages for such non-delivery.¹³ This opinion is contrary to the general rule under such cases. In this case, the telegram was a request to an undertaker to meet the remains of a certain person at the depot and convey same to another place. As said by the court, in this case: "It is contended that if he had received the telegram, he would have made a considerable amount of money as profits from services rendered. He might have made it, or he might have not." In other words, it was claimed that the sender of the message might have "declined the services" on arrival with the remains, and for this reason the damages were too remote. With all due respect to this learned court, we do not agree with it in this holding. The fact of the sender's not accepting the

at once. It was held that only nominal damages could be recovered. See *Melson v. West. U. Tel. Co.*, 72 Mo. App. 111. Extrinsic evidence is admissible to show that the company had notice of the importance: *McPeck v. West. U. Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205, 78 N. W. 63, 43 L. R. A. 214.

¹¹ *McPeck v. West. U. Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205, 43 L. R. A. 214, 78 N. W. 63.

¹² *West. U. Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *West. U. Tel. Co. v. Cook*, 54 Neb. 109, 74 N. W. 395.

¹³ *Clay v. West. U. Tel. Co.*, 81 Ga. 285, 12 Am. St. Rep. 316.

services of the addressee does not enter into the contemplation of the interested parties to the contract at the time it was made; that is, it does not enter into the contemplation of the addressee's mind, for whose benefit the contract was made, that there would be an acceptance or non-acceptance of his services; neither was this entertained by the sender. That which does enter into his contemplation—and presumed to have been entertained at the same time by the company—is the loss of charges for such services, in case there is a delay; and this may be recovered.

§ 563. Same continued—such as not recoverable.

There may be a number of instances, however, when the damages claimed may be too remote or speculative; or, rather, such as would give them the same effect. Thus, if the employment is conjectural or contingent, so that the delivery of the message might or might not have secured the employment or services for the plaintiff, he can not recover.¹⁴ So, it has been held that the failure to secure a position, as deputy assessor, is not a ground for the recovery of more than nominal damages, where it appears that the deputy holds only at the pleasure of the officer appointing him.¹⁵ If the plaintiff could not have rendered his assistance by reason of being employed in other services, he cannot recover on the first, although the message was negligently delayed;¹⁶ or, if the services could not have been rendered on account of other circumstances, had it been delivered in due time, he cannot recover. Thus, if his services are required some distance from his home, which necessitates him to go by railroad, and no train leaves for that place so that he can reach this place in time for his services to be rendered, he cannot recover, if the message was delayed, when the same would have been the result had it not been delayed.

§ 564. Losses which might have been prevented.

The statutes in many states have classed telegraph companies under the head of common carriers, and yet, irrespective of this fact,

¹⁴Walser v. West. U. Tel. Co., 114 N. C. 440, 19 S. E. 366.

¹⁵Kenyon v. West. U. Tel. Co., 100 Cal. 454, 35 Pac. 75.

¹⁶Freeman v. West. U. Tel. Co., 93 Ga. 230, 18 S. E. 647.

their duties and obligations toward the public are somewhat similar to the former. It is only the nature of their employment that makes them different. One engages itself to transmit news, and the other to transport property. The one has under its control property which is invisible, while the other is entrusted with visible and tangible property. For this reason it is more difficult for one to safely accomplish its duties than the other. It is for this that one is considered under the common law as being an insurer, while the other is acting in a quasi-insuring capacity, but with respect to their negligence they are equally liable. A common carrier engages to transport property in its tangible state from one place to another, and on a failure, through its negligence, so to do, it will be liable for all the natural and proximate results which could have been prevented. In other words, if a loss in the transportation of goods has been sustained, which could have been prevented by the injured party had the carrier properly discharged its duty, it will be liable. The same rule will apply to telegraph companies. For instance, if a loss has been sustained by reason of a message being negligently sent or delivered, and the same could have been prevented by the plaintiff, or injured party, had the company properly discharged its duty with respect to such message, it will be liable for all the natural and direct consequences arising from such failure of duty.¹⁷ Thus, where the company's negligence prevents plaintiff from stopping a sale of his property under foreclosure, he is not bound, in order to recover damages, to show that he has been ejected from the property; the loss of his title is enough. But he must be able to show that, had the message been duly delivered, he would have been able to command the money necessary to stop the sale.¹⁸

§ 565. Same continued—must show same would have been prevented.

In order to recover under the above rule, it must be shown, in every case, that there has been a loss sustained by the company's negligence,

¹⁷ *Bodkin v. West. U. Tel. Co.*, 31 Fed. 134; *West. U. Tel. Co. v. McCormick*, 27 So. (Miss.) 606; *Wolfskehl v. West. U. Tel. Co.*, 46 Hun (N. Y.) 542; *Wallingford v. West. U. Tel. Co.*, 60 S. C. 201, 38 S. E. 443; *West. U. Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429, 21 S. W. 109.
¹⁸ *West. U. Tel. Co. v. Hearul*, 7 Tex. Civ. App. 67.

and that the same could and would have been prevented.¹⁹ Thus, where the action is for a failure to deliver a message summoning a physician to visit plaintiff's wife, damages cannot be recovered for the loss of her services, unless it is shown that a prompt delivery of the message and the arrival of the physician would have saved her life.²⁰ In such cases, it is a question for the jury to say as to whether or not the patient, to whom he was summoned, was injured by the delay, and whether the result would have been different had the dispatch been delivered.²¹ A case somewhat similar to this is, where the father was unable, by a negligent delay of a message, to prevent the marriage of his minor child. In this case he was allowed to recover the amount of the child's services from the time of the marriage until it should have reached its majority.²² The gist of the action, in these cases, is the loss of services, and it must be shown that there was a loss in this respect, and that the same not only could but would have been prevented, had the company not been guilty of negligence. So, if the plaintiff is deprived of the services of the person for whom he sues, no recovery can be had so long as that state of affairs exists. Where there is a loss of any nature, sustained by the negligent act of the company, the injured person may recover for same if he can show that it would have been prevented in the absence of such negligence. For instance, where a message from a sister to a brother reading: "Mother started to-night," was changed in its transmission so as to read, "Mother died to-night." It was held that the brother could recover for all the expense he was put to in preparing for the funeral, including flowers bought for said occasion.²³

§ 566. Failing debtors—messages from creditors regarding same.

Cases similar to those discussed in the preceding section have been instituted where messages have been sent by creditors to their agents

¹⁹ West. U. Tel. Co. v. Cornwell, 2 Colo. App. 491; West. U. Tel. Co. v. Norton, 62 S. W. (Tex.) 1081; West. U. Tel. Co. v. Patton, 55 S. W. 973; Cutts v. West. U. Tel. Co., 71 Wis. 46, 36 N. W. 627; Giddens v. West. U. Tel. Co., 111 Ga. 824, 35 S. E. 632.

²⁰ West. U. Tel. Co. v. Kendzora, 77 Tex. 257, 13 S. W. 986.

²¹ Brown v. West. U. Tel. Co., 6 Utah 219, 21 Pac. 918.

²² West. U. Tel. Co. v. Proctor, 6 Tex. Civ. App. 300, 25 S. W. 811.

²³ West. U. Tel. Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627.

in regard to failing debtors, but for the reason that they were negligently delayed by the company, they failed to accomplish their desired purposes. In these, the creditors were allowed to recover the loss which could and would have been prevented but for the company's negligence.²⁴ Thus, where a creditor telegraphed his attorney of the failing circumstances of his debtor, with the instruction to attach his property, but on account of the delay in the delivery of the message to the attorney he failed to attach until four days after the time the message should have been delivered, and, in the meantime, the debtor's property was fully covered by other attachments, the company will be liable for the loss of the debt.²⁵ If the message was delivered on time, but was altered in its transmission so as to show that the claim was less than it really was, the difference in the actual debt and that as shown in the message may be recovered, if this amount has been lost by other creditors having attached all of his other property.²⁶ In either case, it must be shown that the loss was the result of the company's negligence, and but for this the loss could and would have been prevented.²⁷ For instance, an attorney, who was representing the plaintiff in a certiorari proceeding, sent a message containing notice of hearing. On account of the message not being delivered in time, the proceedings were dismissed for want of notice, and the attorney thereupon paid his client the amount involved in the suit and instituted suit to recover damages of the company. It was held that he could not recover in the absence of

²⁴ *Pacific Tel. Cable Co. v. Fleischer* (C. C. A.) 66 Fed. 899; *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Bierhaus v. West. U. Tel. Co.*, 8 Ind. App. 246; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *West. U. Tel. Co. v. Sheffield*, 71 Tex. 570, 10 S. W. 752, 10 Am. St. Rep. 790; *West. U. Tel. Co. v. Wofford*, 42 S. W. (Tex.) 119.

²⁵ *Harstein v. West. U. Tel. Co.*, 89 Wis. 531, 62 N. W. 412. In this case it was held that the loss of the debt was too remote where there was no proof that the plaintiff would have left immediately on receipt of the tel-

egram and the debtor would have secured the claim.

²⁶ *West. U. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. 903, 71 Am. St. Rep. 682. In this case the message as delivered to the company, read, "Attach property of A. for seven hundred and ninety dollars" and as received, read, "Attach property of A. for even hundred and ninety dollars."

²⁷ *Herstein v. West. U. Tel. Co.*, 89 Wis. 531, 62 N. W. 412; *West. U. Tel. Co. v. Bailey*, 115 Ga. 725, 42 S. E. 89; *Martin v. Sunset Tel. Co.*, 18 Wash. 260; *West. U. Tel. Co. v. Gidcumb*, 28 S. W. (Tex.) 699.

proof that he would have succeeded in the proceeding had it not been for the negligence of the company.²⁸ In another case, where the company's agent, in order to save himself and others, willfully withholds a message to a branch bank announcing the failure of its principal until sometime after the bank has opened, the company is liable for all the money paid out by the bank between the time when the message should have been delivered and the time when it was actually delivered.²⁹

§ 567. Failure to transmit money.

It has become a very common thing for money to be transmitted by telegraph companies; or, rather, means are furnished by which the same results are accomplished. When such undertakings have been assumed, it is as much the duty to make speedy transmission of the money, or accomplish the same results, as it is to transmit messages pertaining to other business. So, where they are employed to transmit money and there is a failure to do so, or there is an unreasonable delay in delivery, the company will be liable to the party to whom the money was sent for the actual damages sustained thereby. The measure of damages in such cases is the interest on the money from the time it should have been delivered to the time it was actually delivered, together with the cost of the message.³⁰ Any loss other than this would be too remote.³¹ Thus, where the plaintiff sues for being put out of his house and thereby injured in his reputation, on account of the delay of the company in transmitting money sent to him, it was held that the damages were too remote.³² In order to stop the running of interest, the company must tender to the injured person the money sent, and not merely a check for same.³³

²⁸ West. U. Tel. Co. v. Bailey, 115 Ga. 725, 42 S. E. 89.

²⁹ Stiles v. West. U. Tel. Co., 15 Pac. (Ariz.) 712.

³⁰ Robinson v. West. U. Tel. Co., 68 S. W. 656, 24 Ky. L. Rep. 452; Smith v. West. U. Tel. Co., 150 Pa. St. 561, 24 Atl. 1049. Compare West. U. Tel.

Co. v. Burgess, 56 S. W. (Tex.) 237, 60 Id. 1023.

³¹ Stansell v. West. U. Tel. Co., 107 Fed. 668.

³² Stansell v. West. U. Tel. Co., 107 Fed. 668; West. U. Tel. Co. v. Simpson, 64 Kan. 309, 67 Pac. 839.

³³ Robinson v. West. U. Tel. Co., 68 S. W. 656, 24 Ky. L. Rep. 452.

CHAPTER XXIV.

DAMAGES CONTINUED—FOR MENTAL ANGUISH.

- § 568. In general.
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- 586. Evidence of mental suffering.
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- 594. When may be basis of action—malicious or willful wrong.
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- 597. Same continued—mental suffering following physical pain.
- 598. Conflict of law—with respect to mental damages.
- 599. Rule declared by statutes.

§ 568. In general.

There is no subject which has been so thoroughly discussed, and upon which there has been so many inequitable decisions rendered, as in cases against telegraph companies brought to recover damages for mental injuries, in consequence of their negligence in transmitting or delivering messages. There are innumerable instances in

which these companies should suffer the results of their negligent acts; however, there are many cases brought against them in which they are unmercifully and unjustly dealt with. Among these are most often to be found suits brought to recover damages for mental anguish. While corporations of all kinds are very grasping, and are becoming too much of a monopoly, yet there is no doubt but that they have been very instrumental in the upbuilding and the progress of our country. Where works of enterprise were too great or too hazardous for one man to undertake, the same have been most happily carried out and performed by a number of individuals, incorporated into one body and operating under the powers of corporations. Because of the fact that they are bodies politic, and generally representatives of wealth, the majority of the people seem prejudiced against them; and whenever there is an opportunity given it seems difficult to do them the same justice as is done to individuals. It may seem, that these remarks are unnecessary; but, as is said above, these companies are often unjustly dealt with, not by the courts or those people learned in the law, but by those who sit upon the juries in deciding cases, and there is no time, it seems, when such favorable opportunities present themselves as in those cases which we propose to discuss in this chapter.

§ 569. Same continued—subject divided.

On account of the importance and the peculiar nature of the subject of mental injuries, and the manner in which these are ascertained and compensated for, the closest study and reasoning are required. Therefore, because of its importance, we shall discuss in this chapter, mental suffering and anguish as it stands alone, disconnected from other injuries; how it was considered under the common law; the changes made by later decisions and statutes. Then, we shall discuss it when connected with other injuries.

§ 570. Damages for mental anguish and suffering.

Until a comparatively recent date, it was held, both by the English and American courts, that damages could not be recovered for mental anguish and suffering alone, unaccompanied by pecuniary damages or physical injury, although it may have been the proximate result of negligence on the part of the wrongdoer. This subject was

early considered by the English authorities, and it was there unanimously held, that the injuries were not sufficient to sustain a suit.¹ "Mental pain and anxiety," as said in an early opinion on this subject, "the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where material damage occurs, and is connected with it, it is impossible that a jury, in estimating it, should altogether overlook the feelings of the party interested."² It might be considered in some cases as an aggravation of damages. For instance, in assault and battery and seduction cases, damages could only be recovered for the loss of services, but it was held that the mental suffering could be considered as an aggravation of damages to be recovered. These early English decisions have been, and are, with few exceptions, followed by all the courts of our country. There was but one class of cases—later followed by another—where damages could be recovered for mental suffering unaccompanied by other injuries, and that was for a breach of contract of marriage. In these latter cases, the jury was allowed to take into consideration "the injury to the plaintiff's feelings, affections and wounded pride, and the pain and mortification resulting from the breach of contract," and award damages therefor.³ In cases of willful wrong—especially those affecting the liberty, character, reputation, personal security or domestic relations of the injured party—injuries to the feelings were sufficient grounds to maintain an action thereon.⁴

§ 571. Action in contract or tort—rule the same.

Where the action is to recover damages for mental suffering in consequence of a telegraph company not properly transmitting or de-

¹ *Allsop v. Allsop*, 5 Hurl & N. 554.

² *Allsop v. Allsop*, 5 Hurl & N. See also *Lynch v. Knight*, 9 H. L. Cas. 592.

³ See extensive note to *Weaver v. Bachert*, 44 Am. Dec. 178. See also, *Millington v. Loring*, L. R., 6 Q. B. Div. 190; s. c., 50 L. J. Q. B. 214; s. c., 43 L. T. 659; s. c., 29 Weak. Rep. 257; *King v. Kersy*, 2 Ind. 402; *Haymond v. Saucer*, 84 Ind. 3; *Hill v.*

Maupin, 3 Mo. 323; *Roper v. Clay*, 18 Id. 383, 59 Am. Dec. 314; *Giese v. Schults*, 53 Wis. 462, 10 N. W. 598; *Grant v. Willey*, 101 Mass. 356; *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514.

⁴ *West. U. Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300, 9 So. 833, 13 L. R. A. 859n.

delivering a message, it is immaterial whether the action be brought for the breach of the contract for sending or for the failure to perform the duty devolving on it under the contract. In other words, the rule that such damages cannot be recovered for mental anguish and suffering alone, is the same whatever be the form of the action. The nature and substance of the default and the consequent injury are the same in either form.⁵ If, however, the action is to recover damages for mental suffering where it accompanies other injuries to the person, the rule is different. There is more latitude allowed in the recovery of damages brought in tort, since, in this form of action damages for mental suffering are generally a subject of consideration for the jury.⁶

§ 572. Rule departed from.

The first instance in which this long-recognized rule of the common law was departed from was by the supreme court of Texas in the *So Relle* case. In this case, it was held that the addressee of a telegraph message might recover from the company, as compensation, damages for mental suffering caused by its failure to deliver promptly a message which announced the death of his mother, by reason of which default he failed to attend her funeral.⁷ In support of the ruling in this case, the court cited three cases. One was an action for assault and battery;⁸ another was a case in which a serious and permanent personal injury had been sustained;⁹ and the last case cited was where the wrongful act charged was the seduction of the plaintiff's daughter.¹⁰ In all of these, as a matter of course, and in accordance with generally admitted rules, damages for mental suffering were allowed.¹¹ This court relied mainly, however, on the following passage from the text of *Shearman and Redfield on Negligence*: "In case of a delay or total failure of delivery of a message re-

⁵ *West, U. Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300, 9 So. 833, 13 L. R. A. 85n.

⁶ *Cowan v. West, U. Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545.

⁷ *So Relle v. West, U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805.

⁸ *Hays v. Houston, etc., R. Co.*, 46 Tex. 279.

⁹ *Houston, etc., R. Co. v. Randall*, 50 Tex. 261.

¹⁰ *Phillips v. Hoyle*, 4 Gray, 568.

¹¹ See note 3.

lating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying and recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be estimated in money, but for which a jury should be at liberty to award fair damages."¹²

§ 573. Same continued—So Relle Case overruled and reinstated.

In a later case, the court of Texas went counter to the view taken in the So Relle case, and held that if the plaintiff is not entitled to recover even nominal damages, as for a breach of a contract and has sustained no injury to his reputation, property or person, he can have no recovery for mental suffering alone.¹³ In another case, it was held that damages for mental distress could be recovered where nominal damages were proved, in cases where there was such gross negligence or willfulness as to justify exemplary damages.¹⁴ But both of these cases have since been overruled;¹⁵ so that the So Relle case has been reinstated as the law of Texas, and has been followed by a number of decisions of the same court.¹⁶ And the courts of a few of

¹² Shearman and Redfield on Neg., 4 Ed., sec. 756.

¹³ Gulf C. and Santa Fe R. Co. v. Levy, 59 Tex. 563, 46 Am. Rep. 278.

¹⁴ Gulf C. and Santa Fe R. Co. v. Levy, 59 Tex. 542, 46 Am. Rep. 269.

¹⁵ Stuart v. West. U. Tel. Co., 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623.

¹⁶ Loper v. West. U. Tel. Co., 70 Tex. 689; 8 S. W. 600; West. U. Tel. Co. v. Cooper, 71 Texas 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; West. U. Tel. Co. v. Broesche, 72 Tex. 654, 13 Am. St. Rep. 843; West. U. Tel. Co. v. Brown, 71 Tex. 723, 10 S. W. 323, 2 L. R. A. 766n; West. U. Tel. Co. v. Simpson, 73 Tex. 422, 11 S. W. 385; West. U. Tel. Co.

v. Nations, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914; West. U. Tel. Co. v. Rosentreter, 80 Tex. 406; West. U. Tel. Co. v. Beringer, 84 Tex. 38, 19 S. W. 336; West. U. Tel. Co. v. Erwin, 19 S. W. (Tex.) 1002; West. U. Tel. Co. v. Linn, 97 Tex. 7, 26 S. W. 460, 47 Am. St. Rep 58; West. U. Tel. Co. v. Neel, 25 S. W. 661; West. U. Tel. Co. v. Carter, 2 Tex. Civ. App. 624, 21 S. W. 688; West. U. Tel. Co. v. Jobe, 6 Tex. Civ. App. 403, 25 S. W. 168; West. U. Tel. Co. v. Sweetman, 19 Tex. Civ. App. 435; West. U. Tel. Co. v. May, 8 Tex. Civ. App. 176, 27 S. W. 760; West. U. Tel. Co. v. O'Keefe, 29 S. W. 137; West. U. Tel. Co. v. Warren, 36 S. W. 314; West. U. Tel. Co. v. Kingsley, 8 Tex. Civ. App.

the other states to a greater or less extent.¹⁷ The decisions in the Texas courts are not themselves harmonious and have not escaped the severe criticism of text-writers and other courts. In fact, the earlier decisions have been criticised by later decisions of the same court.

527, 28 S. W. 831; *West. U. Tel. Co. v. Smith*, 33 S. W. 742; *Roach v. Jones*, 18 Tex. Civ. App. 231, 44 S. W. 677; *West. U. Tel. Co. v. Seffel*, 71 S. W. 616.

¹⁷ *Alabama*.—*West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; *West. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23; *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 So. 579; *West. U. Tel. Co. v. Adair*, 115 Ala. 441, 22 So. 73; *West. U. Tel. Co. v. McNair*, 120 Ala. 99, 22 So. 73; *West. U. Tel. Co. v. Crocker*, 135 Ala. 492, 59 L. R. A. 398. These cases seem to have been somewhat modified in the more recent case of *West. U. Tel. Co. v. Crumpton*, 138 Ala. 632, which appears to be the latest decision upon the subject.

Indiana.—*Reese v. West. U. Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583n.

Iowa.—*Mentzer v. West. U. Tel. Co.*, 93 Iowa 752, 28 L. R. A. 72, 62 N. W. 1, 57 Am. St. Rep. 294; *Cowan v. West. U. Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545.

Kentucky.—*Chapman v. West. U. Tel. Co.*, 90 Ky. 265; *West. U. Tel. Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366; *West. U. Tel. Co. v. Fisher*, 107 Ky. 513, 54 S. W. 830; *West. U. Tel. Co. v. Matthews*, 107 Ky. 663, 55 S. W. 427; *West. U. Tel. Co. v. Johnson*, 107 Ky. 631; *West. U. Tel. Co. v. McIlvoy*, 107 Ky. 633; *West. U. Tel. Co. v. Sternbergen*, 107 Ky. 469; *West. U. Tel. Co. v. Cri-*

der, 107 Ky. 600; *Taliferro v. West. U. Tel. Co.*, 54 S. W. 825, 21 Ky. L. Rep. 1290; *Louisville, etc., R. Co. v. Hull*, 68 S. W. 433, 57 L. R. A. 771.

Louisiana.—*Graham v. West. U. Tel. Co.*, 109 La. 1069, 34 So. 91.

North Carolina.—*Young v. West. U. Tel. Co.*, 107 N. C. 370, 9 L. R. A. 669n, 11 S. E. 1044, 22 Am. St. Rep. 883; *Sherrill v. West. U. Tel. Co.*, 116 N. C. 655, 21 S. E. 429, 117 N. C. 352, 23 S. E. 277; *Lyne v. West. U. Tel. Co.*, 123 N. C. 129, 31 S. E. 350; *Cashion v. West. U. Tel. Co.*, 123 N. C. 267, 124 N. C. 459, 31 S. E. 493, 45 L. R. A. 160; *Dowdy v. West. U. Tel. Co.*, 124 N. C. 522, 32 S. E. 602; *Darlington v. West. U. Tel. Co.*, 127 N. C. 448, 37 S. E. 479; *Kennon v. West. U. Tel. Co.*, 126 N. C. 232, 35 S. E. 468; *Landie v. West. U. Tel. Co.*, 124 N. C. 528, 32 S. E. 886; *Meadows v. West. U. Tel. Co.*, 132 N. C. 40, 43 S. E. 512; *Bryan v. West. U. Tel. Co.*, 133 N. C. 693, 45 S. E. 938. See also *Havener v. West. U. Tel. Co.*, 117 N. C. 540, 23 S. E. 457. The latest decision in this state on this point is the case of *Green v. West. U. Tel. Co.*, 136 N. C. 489, 1 Am. & Eng. Ann. Cas. 349, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 980, in which a wider view is entertained than in any other case.

Nevada.—*Barnes v. West. U. Tel. Co.*, 27 Nev. 438, 76 Pac. 931 103 Am. St. Rep. 776, 6 L. R. A. 666.

South Carolina.—*Butler v. West. U. Tel. Co.*, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893; *Marsh v. West.*

§ 574. Federal court view—how held.

The federal court has held to the common-law rule on this subject, and no court before which the question has come up has held any other view than that damages could not be recovered for mental suffering alone.¹⁸ It was, however, conceded in one case that if there had been such gross negligence on the part of the company's agent as to indicate a wanton or malicious purpose in failing to transmit or deliver the message, the mental suffering of the plaintiff might be considered. The state in which the case arises may adhere to the rule in the *So Relle* case, yet this fact need not be considered by the federal court, and this is true although the decisions in these states may have been largely induced by the provisions of the statutes in those states.¹⁹

§ 575. Ground upon which these cases are maintained.

The courts in those states which hold that damages may be recovered for mental suffering alone, base their opinions for maintaining such cases on different theories. Some hold that when the company has been guilty of a breach of a contract of sending, in which the

U. Tel. Co., 65 S. C. 430, 43 S. E. 953. At first the doctrine was denied in *Lewis v. West*. U. Tel. Co., 57 S. C. 325. This was followed by an act of the legislature (23 stat. 748; Code (1902), vol. 1, section 2223), permitting damages in such cases. This statute was held to be constitutional in, *Simmons v. West*. U. Tel. Co., 63 S. C. 429, 57 L. R. A. 607.

Tennessee.—*Wadsworth v. West*. U. Tel. Co., 86 Tenn. 695, 6 Am. St. Rep. 861; *Railroad Co. v. Griffin*, 92 Tenn. 694; *West. U. Tel. Co. v. Robinson*, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431n; *West. U. Tel. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *Gray v. West. U. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301n, 91 Am. St. Rep. 706; *West. U. Tel. Co. v. Mel- lcn*, 96 Tenn. 66, 33 S. W. 725.

Washington.—*Davis v. Tacoma R.*, etc., Co., 35 Wash. 203, 66 L. R. A. 802.

¹⁸ *Chase v. West. U. Tel. Co.*, 44 Fed. 554; *Crawson v. West. U. Tel. Co.*, 47 Fed. 544; *Kester v. West. U. Tel. Co.*, 55 Fed. 603; *Tyler v. West. U. Tel. Co.*, 54 Fed. 634; *Gahan v. West. U. Tel. Co.*, 59 Fed. 433; *Stansell v. West. U. Tel. Co.*, 107 Fed. 668; *McBride v. Sunset Tel. Co.*, 96 Fed. 81; *West. U. Tel. Co. v. Ward*, (C. C. A.) 57 Fed. 471, 21 L. R. A. 700; *Wilson v. Richmond, etc., R. Co.* (C. C. A.), 52 Fed. 264, 17 L. R. A. 804; *West. U. Tel. Co. v. Sklar* (C. C. A.), 126 Fed. 295. Compare *Beasley v. West. U. Tel. Co.*, 39 Fed. 181.

¹⁹ *West. U. Tel. Co. v. Sklar* (C. C. A.), 126 Fed. 295.

plaintiff was a party or which was made for his benefit, the latter then has a cause of action. Having acquired a standing in court, he is then entitled to recover all damages which were the direct and proximate result of said breach.²⁰ There being a breach of the contract—and it was held in one case that it was necessary for the action to be in contract and not in tort²¹—it was not necessary to prove nominal damages, since this would be a means of avoiding any damages. As was said: "To speak of the right to nominal damages as a condition for giving substantial damages, is a palpable contradiction. To give nominal damages necessarily denies any further recovery. . . . It is manifest that to allow such a recovery is, in real substance, an effort to protect feelings by legal remedy."²² In some of the other states, the courts proceed on the theory of certain statutes therein declaring the duties and liabilities of these companies. In Tennessee, for instance, there is one statute²³ which requires telegraph companies to transmit and deliver all proper messages "correctly and without unreasonable delay;" and it is declared by another statute that, on a failure to do so, the defaulting company shall be liable in damages to the party aggrieved. In a case brought under these statutes to recover damages for mental anguish and suffering in consequence of a message not being properly delivered and which related to the serious illness and death of plaintiff's brother, the court said: "The act does not discriminate between messages appertaining to matters pecuniary merely and those having reference to matters of a domestic nature, as are those now before us. . . . There is no discrimination with respect to the nature of the messages to be conveyed nor is there any discrimination with respect to the nature of the damages to be recovered for the company's default. One section imposes a general duty, and the other gives a universal right of action for

²⁰ West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; West. U. Tel. Co. v. Wilson, 93 Ala. 32, 9 So. 414, 32 Am. St. Rep. 23; Chapman v. West. U. Tel. Co., 88 Ga. 763, 30 Am. St. Rep. 183, 17 L. R. A. 430.

²¹ Blount v. West. U. Tel. Co., 27 So. 779, 126 Ala. 105.

²² Chapman v. West. U. Tel. Co., 88 Ga. 763, 30 Am. St. Rep. 183, 17 L. R. A. 430.

²³ Code M. & V., § 1541. See also 23 Stat. 748; Code 1902, vol. 1, § 2223 South Carolina.

the breach of that duty. And of necessity the nature and amount of damages recoverable in each particular case are to be determined by the character of the message and the extent of the injury caused by the defendant's default."²⁴ But in order to recover damages in cases where the courts base their opinions on either theory, it is necessary that the company be informed, either by the face of the message, or by extrinsic evidence, of the nature and character of the message; since, if it does not enter into the contemplation of the parties at the time the contract was made that mental injuries would be the result of the breach of said contract, damages cannot be recovered therefor.²⁵

§ 576. View of subject in Louisiana.

In Louisiana it is held that damages may be recovered for mental anguish or suffering disconnected from pecuniary damages or physical injuries. The view the courts in that state entertain on this subject is not necessarily derived from the opinion in the *So Relle* case, or by virtue of any statutory enactments. It must be remembered that the laws in that state are not founded on the common-law principles; but, in view of the peculiar provisions of the civil law, which is the basic law of Louisiana, such damages have been allowed.²⁶

§ 577. Instances in which damages are allowed.

The cases in which damages are allowed for mental suffering and anguish are such as relate to the serious illness, death or time set for burial of some one related to the party to whom the message is sent. But in a recent case decided in the supreme court of North Carolina, it was held that the plaintiff could recover compensatory damages for mental suffering disconnected from any physical pain or attending circumstances of sickness or death.²⁷ We very much fear that this

²⁴ *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 872.

²⁵ *Graham v. West. U. Tel. Co.*, 109 La. Ann. 1069, 34 So. 91.

²⁶ *Reese v. West. U. Tel. Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583n; *So Relle v. West. U. Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805.

²⁷ *Green v. West. U. Tel. Co.*, 136 N. C. 489, 1 Am. & Eng. Ann. Cas. 349, 103 Am. St. Rep. 953, 67 L. R. A. 985.

case will have the same effect in that state as the *So Relle* case had in Texas.

§ 578. Limitation of rule.

There has been no case where the liabilities of telegraph companies were concerned, which has been the cause of so much litigation over unreasonable claims as the *So Relle* case. It is the peculiar nature of the complaint that makes the damage so difficult to fix, and thereby handle such actions with justice. No one but the plaintiff knows the extent of his mental sufferings, and, for this reason, it is not only difficult to prove the extent of such injuries, in order that he may recover a sufficient compensation therefor, but it is much more difficult for defendant company to make any defense in these cases. The Texas courts have long since realized this fact and have attempted in various ways to put a limit to such actions, which have been an object of much criticism and discord among their own courts. For instance, a distinction seems to have been drawn, in that state, between the negligence in failing to deliver a message, which causes mental pain and suffering, and failing to deliver one which, if delivered, would relieve such suffering. In a case²⁸ which held this distinction, it seems that the plaintiff and his wife had received information of the dangerous illness of the latter's mother. Subsequently, a message was sent containing information of the mother's improved condition. "The damage here complained of was the mere continued anxiety caused by the failure to promptly deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of the breach of the contract in most cases. But the cases are rare in which such emotions can be held to be an element of damages resulting from the breach. For injuries to feelings in such cases the courts cannot give redress. Any other rule would result in intolerable litigation." As will be seen, the distinction between these cases was so unsubstantial that it was evidently resorted to for the express purpose of obstructing the tide of "intolerable litigation" flowing from the decisions following the *So Relle* case.

²⁸ *Rowell v. West, U. Tel. Co.*, 75 Tex. 26, 12 S. W. 534.

§ 579. Same continued—suffering must be real.

Another means by which the flow of this "intolerable litigation" has been attempted to be obstructed is, by the rule laid down in some of those cases, and closely adhered to, that in order for damages to be recovered in such cases, the mental suffering must be real and not such as may be the result of a too sensitive or excitable mental constitution or a distorted imagination.²⁹ "If grief or sorrow can be produced by things unreal, mere pigments of the brain, or a tort, an individual of a somber, gloomy imagination would often be entitled to large damages on account of mental suffering, while others of a buoyant fancy, for the same breach of duty, would not be entitled to any thing; and damages, instead of being measured by the rule of law as applied to the rule of facts would largely depend upon the fertility of the imagination of the suitor."³⁰ Thus, mere anxiety resulting from plaintiff's inability to learn what he seeks to know of his relatives is no ground for recovery of damages.³¹ Neither is a suit maintainable on the ground of mere anger or resentment in failing to deliver a message in regard to a death;³² nor the worry of the loss over a position by a student, although the worry seriously interfered with his studies.³³

§ 580. Same continued—must be the result of the cause of complaint.

Juries are so easily misled through prejudice, sympathy and ignorance from the main cause of the action, in such cases, to sufferings of the mind, resulting from other causes, that it should always be the duty of the courts, on proper request, to instruct them that a recovery could only be had for the injuries resulting directly and proximately from the cause of complaint, and that none other should be considered in their deliberation.³⁴ As said heretofore, the plaintiff

²⁹ *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715; *Morrison v. West. U. Tel. Co.*, 24 Tex. Civ. App. 347, 59 S. W. 1127.

³⁰ *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715.

³¹ *Akard v. West. U. Tel. Co.*, 44 S. W. (Tex.) 538.

³² *West. U. Tel. Co. v. Bell*, 61 S. W. (Tex.) 942.

³³ *West. U. Tel. Co. v. Partlow*, 30 Tex. Civ. App. 599, 71 S. W. 584.

³⁴ *Beasley v. West. U. Tel. Co.*, 39 Fed. 187; *Rosser v. West. U. Tel. Co.*, 130 N. C. 251, 41 S. E. 378; *Cashion v. West. U. Tel. Co.*, 123 N. C.

is the only party who knows the extent of his suffering, and in attempting to show these to others he is liable to expose the injury arising from other kindred causes. His injuries may be the result of several causes; so, it would be difficult for him to measure out and divide the whole so as to give the extent of suffering resulting from the cause of complaint. This fact was not lost sight of by Judge Watts, who rendered the decision in the *So Relle* case. In closing his opinion, he said: "It should be remarked that great caution ought to be observed in the trial of cases like this; as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company, for it is only the latter for which a recovery may be had; and the attention of the jury might well be called to that fact."³⁵

§ 581. Same continued—suffering must be of the plaintiff.

There is no doubt but that the mind may be as seriously injured as any part of the body; in fact there is such a close union between the two that one can hardly suffer without the other being affected more or less. So, it is not that we intend to be understood in saying that the mind cannot be injured, for which damages may be recovered, but that the difficulty of proving the injury is so great it should not—only in certain cases—be the only grounds for an action. There is a marked resemblance between the sufferings of the mind, caused by injuries thereto, and the sufferings of the body, and yet this can only be appreciated by the injured person, himself. If we could discern them both, the results with respect to us would be exactly the same. but, while one can be seen or examined, and the extent of suffering thereby, to a proximate degree, measured, yet there is no way that

207, 31 S. E. 493, 124 N. C. 459, 45 L. R. A. 160, 32 S. E. 746; *Wadsworth v. West*, U. Tel. Co., 86 Tenn. 695, 6 Am. St. Rep. 864; *So. Relle v. West*, U. Tel. Co., 55 Tex. 308, 40 Am. Rep. 805; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 543, 46 Am. Rep. 269; *West. U. Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; *Johnson v. West*,

U. Tel. Co., 14 Tex. Civ. App. 536, 38 S. W. 64; *West. U. Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429, 21 S. W. 109; *West. U. Tel. Co. v. Warren*, 36 S. W. 314; *West. U. Tel. Co. v. Stevens*, 2 Tex. Civ. App. 129, 21 S. W. 148; *West. U. Tel. Co. v. Edmondson*, 91 Tex. 206, 66 Am. St. Rep. 873.

³⁵*So Relle v. West*, U. Tel. Co., 55 Tex. 308, 40 Am. Rep. 808.

the injuries to the mind can be so ascertained or determined. It is generally held that if there is an injury to the body, damages may be recovered for mental suffering which is the direct result of the same cause that produced the bodily injury, but in no instance can the same damages be recovered in actions for physical pain resulting from a different cause than that of the latter. Neither can the physical sufferings of another be considered in a case brought exclusively by the plaintiff for his own bodily hurts, as he is the only person affected with respect to that action. It is generally held, therefore, in those cases where damages may be recovered for mental anguish alone that the suffering of the plaintiff's mind and not that of others, who may be affected thereby, can be considered by a jury. Thus, when the plaintiff's relatives endure suffering and distress of mind on account of his absence, this fact cannot be considered in awarding him damages for his mental anguish.³⁶

§ 582. Same continued—anguish from independent causes.

A distinction has been drawn, as heretofore noted, in those states holding that mental distress alone was sufficient grounds for an action, between injuries to the mind caused by a delay or non-delivery of a message and that resulting from independent causes.³⁷ Thus, in an action on a delayed message sent by the mother to her daughter in regard to the serious illness of the latter's father, the company will not be liable to the mother in damages for her mental suffering and distress, caused by the want of the consoling presence of her daughter at the burial, where she could and would have been present, but could not have been present at the death if the message had not been delayed.³⁸ Neither is mental anguish and suspense caused by a tardy delivery of a message announcing the serious illness of plaintiff's father, and which delayed her twenty-four hours in starting by

³⁶ *Gulf, etc., Tel. Co. v. Richardson*, 79 Tex. 649, 15 S. W. 689; *West. U. Tel. Co. v. Lovett*, 24 Tex. Civ. App. 84, 58 S. W. 204.

³⁷ *Sparkman v. West. U. Tel. Co.*, 130 N. C. 447, 41 S. E. 881; *McCarthy v. West. U. Tel. Co.*, 56 S. W. (Tex.) 568; *West. U. Tel. Co. v. Ed-*

mondson, 91 Tex. 206, 66 Am. St. Rep. 873; *West. U. Tel. Co. v. Bass*, 28 Tex. Civ. App. 418; *West. U. Tel. Co. v. Parks*, 25 S. W. (Tex.) 813.

³⁸ *West. U. Tel. Co. v. Luck*, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869. See also *Rowell v. West. U. Tel. Co.*, 75 Tex. 26, 12 S. W. 534.

rail to see him, a ground to be considered, where the plaintiff could not have arrived at his home in time for the funeral had the message been delivered promptly.³⁹ In another case, a son telegraphed his father to send a carriage to meet him at a certain place and to wire him when the carriage would arrive. He waited several days for a reply to his message, and on account of failing to get one, he suffered great distress of mind. It was held, that this suffering could not be considered in an action to recover damages for mental worry caused by the message not being delivered.⁴⁰ So, also, where plaintiff and his wife had received information of the dangerous illness of the latter's mother, and subsequently a message was sent informing them of her improved condition, but the company failed to deliver it. It was held that there could be recovery for the mental anguish suffered by the plaintiff and his wife which a delivery of the message would have relieved.⁴¹

§ 583. Same continued—must have prevented the injury.

As has been heretofore noted, damages cannot be recovered from a telegraph company for pecuniary loss in consequence of its negligent transmission or delivery of a message, when the same could not have been prevented had the message been properly delivered. The same rule applies to cases brought to recover damages for mental suffering. So, if the suffering to the mind could not have been prevented had the message been promptly delivered, the plaintiff cannot recover, although the company negligently delayed its delivery.⁴² In

³⁹ West. U. Tel. Co. v. Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869.

⁴⁰ McAllen v. West. U. Tel. Co., 70 Tex. 243, 7 S. W. 715.

⁴¹ Rowell v. West. U. Tel. Co., 75 Tex. 26, 12 S. W. 534.

⁴² Where the plaintiff is kept away from the death bed of a relative: Cumberland Tel. Co. v. Brown, 104 Tenn. 56, 50 L. R. A. 277, 78 Am. St. Rep. 906; West. U. Tel. Co. v. Smith, 88 Tex. 9; West. U. Tel. Co. v. Housewright, 5 Tex. Civ. App. 1, 23 S. W.

824. See also West. U. Tel. Co. v. Eskridge, 7 Ind. App. 208; West. U. Tel. Co. v. Smith, 30 S. W. (Tex.) 937; West. U. Tel. Co. v. Drake, 14 Tex. Civ. App. 601, 38 S. W. 632; West. U. Tel. Co. v. Johnson, 16 Tex. Civ. App. 546; West. U. Tel. Co. v. Waller, 47 S. W. (Tex.) 396; West. U. Tel. Co. v. Norris, 25 Tex. Civ. App. 43, 60 S. W. 982. Where plaintiff is kept away from the funeral of some relative: West. U. Tel. Co. v. Stone, 27 S. W. (Tex.) 144; West. U. Tel. Co. v. Linn, 87 Tex. 7, 26 S. W. 490;

cases brought to recover damages for distress of mind, it is incumbent upon the plaintiff to show that he not only could but would have prevented the injury complained of, if the message had been promptly delivered to him. Thus, where the son brings suit against a company to recover damages for mental anguish and suffering, resulting in his being kept away from the deathbed of his father, in consequence of a telegram being delayed announcing the latter's condition, he must show that he could and would have reached his father before his death had the message been promptly delivered.⁴³ Whether or not he could and would have gone to his father had he received the message promptly, is a question for the jury, although he may have testified that he could and would have done so.⁴⁴

§ 584. Same continued—postponement of funeral services.

It has been attempted to be shown in some cases in order to evade the above rule, that notwithstanding the fact that the desired object of the message could not have been complied with had it been promptly delivered, yet had it been received in time, other arrangements could have been made by which the injury would have been prevented. But this rule cannot be evaded by showing that if the message had been promptly delivered, the plaintiff would have arranged a postponement of the funeral until he could have gotten there.⁴⁵ The

West. U. Tel. Co. v. Motley, 87 Tex. 38, 27 S. W. 52, reversing 27 S. W. 51. It is also essential that the failure of the company to discharge its duty promptly be the proximate cause of the distress and suffering for which damages are sought: West. U. Tel. Co. v. Andrews, 78 Tex. 305, 14 S. W. 641; West. U. Tel. Co. v. Hendrick, 26 Tex. Civ. App. 366, 63 S. W. 341. Compare Phillips v. West. U. Tel. Co., 69 S. W. (Tex.) 997; West. U. Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772.

⁴³Cumberland Tel. Co. v. Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277.

⁴⁴West. U. Tel. Co. v. May, 8 Tex.

Civ. App. 176, 27 S. W. 760. See also Evans v. West. U. Tel. Co., 56 S. W. 609.

⁴⁵West. U. Tel. Co. v. Stone, 27 S. W. (Tex.) 144; West. U. Tel. Co. v. Linn, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; West. U. Tel. Co. v. Motley, 87 Tex. 38, 27 S. W. 52, reversing 27 S. W. 51. Compare West. U. Tel. Co. v. Van Way, 54 S. W. (Tex.) 414; West. U. Tel. Co. v. Carter, 20 S. W. (Tex.) 834; West. U. Tel. Co., Parsons, 72 S. W. 800, 24 Ky. L. Rep. 2008. In these latter cases it was held that if it appeared to a certainty, that such postponement would have been made, damages could be recovered.

conditions attached to such a state of affairs are too uncertain. For instance, the funeral might or might not have been postponed; or, the reply message might not have been received in time to arrange for such postponement. The rule that such injury could and would have been prevented had the message been delivered in time, cannot be evaded by such uncertain propositions.

§ 585. Same continued—failure to transmit money—no cause.

It was stated in another place in this chapter, that where a telegraph company contracts to transmit money, but fails to promptly do so, the measure of damages for such breach is the interest on the money from the time it ought to have been transmitted to the time it was sent, together with the price of the message. It follows, therefore, that a failure to promptly deliver money is no ground upon which the addressee may recover damages for mental worry and anguish.⁴⁶

§ 586. Evidence of mental suffering.

The general rule of evidence is, that where the state of a person's mind, his sentiment or disposition at a certain time is the subject of inquiry, his statements and declarations at that period are admissible.⁴⁷ So, the declarations of a testator may be received to show that his mind was under undue influence at the time of making the will;⁴⁸ and, so, as to the extent of a mental disease, the declarations of the person affected are admissible.⁴⁹ It has been held, from this general

⁴⁶ *Robinson v. West. U. Tel. Co.*, 68 S. W. 656, 24 Ky. L. Rep. 452; *De Voegler v. West. U. Tel. Co.*, 10 Tex. Civ. App. 229; *Ricketts v. West. U. Tel. Co.*, 10 Tex. Civ. App. 226; but in *West. U. Tel. Co. v. Wells*, 39 So. (Fla.) 838, it was held that, where the company willfully refused to pay to plaintiff money sent by the former thereby causing plaintiff and family to travel twenty-four hours without food or funds, he might recover damages for bodily pain and suffering and for mental pain and anguish attendant

thereon. Compare *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810.

⁴⁷ *Barthelmy v. People*, 2 Hill 248; *Hester v. Com.*, 85 Pa. St. 139; *Wetmore v. Mell*, 10 Ohio St. 26.

⁴⁸ *Milton v. Hunter*, 13 Buch (Ky.) 163; *Lueso v. Cannon*, 13 Id. 601; *Batton v. Watson*, 13 Ga. 63, 58 Am. Dec. 504.

⁴⁹ *Rex v. Johnson*, 3 Car. & K. 354; *Howe v. Howe*, 99 Mass. 88; *State v. Kring*, 64 Mo. 591.

rule, as a basis, that where the action is brought to recover damages for distress of mind or for mental anguish and suffering in consequence of a negligent transmission or delay in the delivery of a message, the natural condition of the mind, with respect to such suffering, may be shown by evidence of his behavior and natural expressions and utterances at the time of such. Thus, if his expression of feelings is such as to indicate a distress of mind, or if his behavior shows that his feelings are greatly injured as a result of the message not accomplishing its purpose, there is no better way to show this to a jury than by such facts. If a person is injured physically, it is natural for him to show suffering, resulting therefrom, by his behavior, by natural expression of countenance or by utterances of pain: the same rule is applicable when the mind is that part of the body which suffers, and the best way to show such pain, or suffering is by these facts.⁵⁰

§ 587. Same continued—aggravation of suffering.

There may be circumstances which would have a tendency to aggravate mental suffering and anguish; and when this is the case, the facts tending to show it should be admitted. Thus, where the plaintiff was prevented from being present at the deathbed of his mother, by a delayed message announcing her serious illness, he may be allowed, in an action brought to recover damages for mental suffering in consequence of such delay, to show that he was her favorite son.⁵¹ The great affection existing between the plaintiff and the person who died would naturally create a greater injury to the mind of the former, if he was prevented from being present during the latter's last moments in this world, and any facts which tend to show this relationship should be brought before the jury. The court, in rendering an opinion on this point, said: "While juries in the absence of any evidence on the subject may act upon their own knowledge of

⁵⁰ West. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; West. U. Tel. Co. v. Carter, 20 S. W. (Tex.) 834; Mentyer v. West. U. Tel. Co., 93 Iowa 752, 28 L. R. A. 72, 62 N. W. 1, 57 Am. St. Rep. 294.

Compare West. U. Tel. Co. v. McLoud, 22 S. W. (Tex.) 988; West. U. Tel. Co. v. Adams, 75 Tex. 535, 16 Am. St. Rep. 920.

⁵¹ West. U. Tel. Co. v. Lydon, 82 Tex. 364, 18 S. W. 701.

the affection existing between a mother and son, still the admission of evidence upon the subject may be proper, and we cannot say that proof of a special regard felt and shown by a mother for one of her children may not be properly considered by the jury, in connection with other circumstances, in estimating the feelings of the child for the parent."⁵² But, in such cases, it is not proper to admit evidence in which it is attempted to be shown that the mother was making frequent inquiries of the son's whereabouts and entreating that he be brought to her bedside.⁵³ While this may be a means of showing the affection of the mother for the son, yet if such facts are not imparted to the latter until after the mother's death the suffering endured by the son by being prevented from being with her before death would not be any greater, and "a deathbed scene is reproduced of such peculiar pathos that its influence would be almost sure, under a ruling admitting it as proper subject for consideration, to usurp the attention of the jury to the exclusion of those considerations which alone should control their action."⁵⁴

§ 588. Same continued—sickness as a result—admissible.

In those jurisdictions where a person is allowed to recover damages for mental suffering in consequence of a message not being properly delivered announcing the serious illness of a relative, or where he is prevented from being at the burial by such delay, he may show as a result of such suffering that he became ill and was compelled to take his bed and incurred medical expenses.⁵⁵ This is merely a means of showing the extent of his suffering; and, of course, the greater the suffering, the greater should be the compensation therefor. If there were other causes intervening which produced this result, of course this could not be considered in determining the amount of damages to be recovered; yet it may be admitted to show that the intervening cause, and not the delay of the message, was the proximate cause of

⁵² *Id.*

⁵⁴ *West. U. Tel. Co. v. Stiles*, 89 Tex. 312, 34 S. W. 438. Compare *West. U. Tel. Co. v. Evans*, 1 Tex. Civ. App. 297, 21 S. W. 266.

⁵⁵ *West. U. Tel. Co. v. Waller*, 96

Tex. 589, 74 S. W. 751, 97 *Am. St. Rep.* 936.

⁵⁵ *Simmon v. West. U. Tel. Co.*, 63 S. C. 425, 57 L. R. A. 607, 41 S. E. 763; *West. U. Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435.

the suffering. The mental suffering and anguish must be the natural and proximate result of the negligence of the company and such as was contemplated by the parties at the time the contract was made as would be the most natural and probable result of such breach. In such cases, there can be no recovery for "physical suffering" resulting from plaintiff's being kept from his relative's funeral, in the absence of specific proof of such suffering as a result of the deprivation.⁵⁶

§ 589. Same continued—matters of defense—want of affection.

Telegraph companies, where actions are brought against them to recover damages for mental suffering, may use any defense which tends to show that the mind was not injured or impaired. The greatest among any defenses in this respect is that there was no affectionate feelings entertained by the plaintiff for the person about whom the message, which is delayed, concerns. It seems that the grief of a loss of one, or a failure to see such person in his last moments, or to be present to tender the last respect to the dead, affects more directly the mind than any other part of the body; and, so, if there is no affectionate feelings for such person, the mind cannot become impaired or injured by being deprived of any of these pleasures. So, it has been held, that the company may show, as a defense in an action brought by the father for damages for mental suffering, in consequence of a delayed message announcing the serious illness of his daughter, that he had abandoned his family and was living apart from them.⁵⁷ We think that, where such damages are allowed, if there is any affectionate feelings entertained by the father for the daughter, he should on proof of such fact, be compensated for the injured feelings which were endured. In one case, the company attempted to prove that the plaintiff, a grandmother of the child about whom the message concerned, had a number of grandchildren—among whom her affection was divided—but the court held that the evidence was irrelevant.⁵⁸

⁵⁶ West. U. Tel. Co. v. Thompson, 18 Tex. Civ. App. 609, 45 S. W. 429.

⁵⁸ West. U. Tel. Co. v. Crocker, 135 Ala. 492, 33 So. 45, 59 L. R. A. 398.

⁵⁷ West. U. Tel. Co. v. Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70.

§ 590. Relationship material.

It was shown in another part of this work that in order to hold a telegraph company liable in damages for mental suffering, caused by a message announcing the dangerous illness, or the time set for the funeral services of a certain person, being delayed and thereby preventing the addressee from being present with said person before death, or at the burial, the company must have had some information of the fact that there was a close relationship between these two persons. It necessarily follows, therefore, that there must be a relationship existing between these two parties before damages for mental suffering can be recovered. Whenever a message announcing the serious illness, death or time of funeral of a person related in consanguinity to the addressee is delayed, mental anguish and suffering will be presumed, when, through the fault of the company, he is prevented from being present at the bedside or funeral of such relative; and it is not necessary for him to prove such injury.⁵⁹ While we perhaps cannot detect with the eye any change or difference, it is a natural result that the whole tree is affected when it loses one of its branches. It is according to nature that such shall be the result. The same rule applies to man. If one of his limbs are lost, the whole body becomes more or less affected. It is a presumption and one not necessary to be proven. This illustration may be farfetched, but it is a fact, nevertheless, that, when one member of a family suffers, or of whom we are deprived, we suffer as a natural consequence; and when the relation is close, the fact does not have to be proven. It follows, therefore, that if there is not a relationship, especially by blood, the presumption of mental suffering cannot be maintained, but same must be shown.⁶⁰ It seems, however, that if there is an affectionate feeling existing between the parties, although they may not be related

⁵⁹ West. U. Tel. Co. v. Collin, 88 Tex. 94, 30 S. W. 896; West. Tel. Co. v. Randalls, 34 S. W. (Tex.) 447; West. U. Tel. Co. v. Porter, 26 S. W. 866; West. U. Tel. Co. v. McLeod, 22 S. W. 988; West. U. Tel. Co. v. Thompson, 18 Tex. Civ. App. 609, 45 S. W. 429; West. U. Tel. Co. v. Crocker, 135 Ala. 492, 33 So. 45, 59 L. R. A. 398.

⁶⁰ West. U. Tel. Co. v. Ayres, 131 Ala. 391; Robinson v. West. U. Tel. Co., 68 S. W. 656, 24 Ky. L. Rep. 451. See, also, West. U. Tel. Co. v. Steenberg, 107 Ky. 469, 54 S. W. 829; Morrow v. West. U. Tel. Co., 107 Ky. 517, 54 S. W. 853; Davidson v. West. U. Tel. Co., 54 S. W. 830.

by blood, proof may be admitted showing this fact, but it will never be presumed that mental suffering and anguish has been sustained.

§ 591. Nature of damages.

As will be seen from a perusal of the preceding sections, actions brought to recover damages for mental suffering relate to messages announcing the serious illness, death or time of funeral services of some relative of the addressee, and are intended to bring him to the bedside or funeral of such person, or to comply with the information in other ways to his interest.⁶¹ The anxiety to be present on such occasion is greater than any that can ever befall a man, as during these short moments we experience that which can never be witnessed again while on earth; for this reason, cases of this nature most always come upon the ground of failure to deliver such messages in time. Cases, however, have been brought to recover damages for a failure to deliver other kinds of messages where they are of information, and not calculated or intended to affect the movement of the addressee.⁶² Thus, where a father is prevented from stopping the marriage of his daughter by a delay in delivering a message to that effect, he was allowed to recover damages for mental suffering resulting from an undesirable marriage,⁶³ although he could not recover for the mental suffering of his wife, unless it appeared to the company that he had a wife.

§ 592. Actions do not survive—limitation.

Actions against telegraph companies for damages for mental suffering are for "an injury to the person," within the rule that such actions do not survive, and the right of the action dies with the person.⁶⁴ His injuries are such as none other can suffer, or, if they suf-

⁶¹ West. U. Tel. Co. v. Melvov, 107 Ky. 633, 55 S. W. 428; West. U. Tel. Co. v. Hale, 11 Tex. Civ. App. 79, 32 S. W. 814.

⁶² West. U. Tel. Co. v. Odom, 21 Tex. Civ. App. 537, 52 S. W. 632; West. U. Tel. Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627.

⁶³ West. U. Tel. Co. v. Proctor. And as will be seen it has been applied to other causes: § 577.

⁶⁴ Morton v. West. U. Tel. Co., 130 N. C. 299, 41 S. E. 484; Fitzgerald v. West. U. Tel. Co., 15 Tex. Civ. App. 143, 40 S. W. 421.

fer same, the injury is too remote for damages to be recovered. The sufferer himself is the only person who can maintain a suit thereon. There are statutes, however, which confer the right to the husband for the benefit of the wife, or the parent for the child; but this is the case only when the injured person still lives. These actions also fall within the statutes of limitation, as "actions for the injuries to the person."⁶⁵

§ 593. Damages for mental suffering—doctrine denied.

While it is held, in some few states, that damages may be recovered for mental suffering unaccompanied by a pecuniary loss or physical injury; yet the weight of authority holds a contrary view.⁶⁶ With

⁶⁵ *Kelley v. West. U. Tel. Co.*, 17 Tex. Civ. App. 344, 43 S. W. 532; *Martin v. West. U. Tel. Co.*, 6 Tex. Civ. App. 619, 26 S. W. 136.

⁶⁶ *United States*.—*Chase v. West. U. Tel. Co.*, 44 Fed. 554, 10 L. R. A. 464; *Crasson v. West. U. Tel. Co.*, 47 Fed. 544; *Tyler v. West. U. Tel. Co.*, 54 Fed. 634; *Gahan v. West. U. Tel. Co.*, 59 Fed. 433; *Stansell v. West. U. Tel. Co.*, 107 Fed. 668; *McBride v. Sunset Tel. Co.*, 96 Fed. 81; *West. U. Tel. Co. v. Wood*, 57 Fed. (C. C. A.) 471, 21 L. R. A. 706; *Wilcock v. Richman, etc.*, R. Co., 52 Fed. (C. C. A.) 264, 17 L. R. A. 804; *West. U. Tel. Co. v. Sklar*, 126 Fed. (C. C. A.), 295. Compare *Lebridge v. West. U. Tel. Co.*, 39 Fed. 181.

Arkansas.—*Peay v. West. U. Tel. Co.*, 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463.

Dakota.—*Russel v. West. U. Tel. Co.*, 3 Dak. 315.

Florida.—*International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810.

Georgia.—*Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430; *Giddens*

v. West. U. Tel. Co., 111 Ga. 824, 35 S. E. 638.

Illinois.—*West. U. Tel. Co. v. Hal-
tom*, 71 Ill. App. 63; *North Chicago
St. R. Co. v. Duebner*, 85 Ill. App. 602.
Compare *Logan v. West. U. Tel. Co.*,
84 Ill. 468, holding that nominal dam-
ages at least are recoverable.

Indiana.—*West. U. Tel. Co. v. Fer-
guson*, 157 Ind. 64, 60 N. E. 1080, 54
L. R. A. 846, overruling *Reese v. West.
U. Tel. Co.*, 123 Ind. 294, 7 L. R. A.
583n; *West. U. Tel. Co. v. Adams*, 28
Ind. App. 420. The rule of the *Reese*
case had been followed in *West. U.
Tel. Co. v. Stratemeier*, 6 Ind. App.
125; *West. U. Tel. Co. v. Newhouse*, 6
Ind. App. 434; *West. U. Tel. Co. v.
Clime*, 8 Ind. App. 364; *West. U. Tel.
Co. v. Briscoe*, 18 Ind. App. 22; *West.
U. Tel. Co. v. Bryant*, 17 Ind. App.
70; *West. U. Tel. Co. v. Todd*, 22 Ind.
App. 701; *West. U. Tel. Co. v. Cain*,
14 Ind. App. 115. See, also, *Hadley
v. West. U. Tel. Co.*, 150 Ind. 191.

Kansas.—*West. v. West. U. Tel. Co.*,
39 Kan. 93, 17 Pac. 807, 7 Am. St.
Rep. 530.

Maine.—*Wyman v. Leavitt*, 71 Me.
227, 36 Am. Rep. 303.

all due respect to the courts holding that damages for such injuries may be recovered, we are clearly convinced that the ground upon which they base their opinion is not of very firm foundation. We do not deny the fact that the mind is injured to a certain extent as a result of the breach of almost any contract, but it is of such peculiar nature that we cannot begin to estimate the degree of suffering in order to make sufficient compensation therefor. The anxiety of the mind is too refined and vague in its nature to be taken as a subject for pecuniary consideration.⁶⁷ It deals too much in the spiritual land and is a matter that appeals to the imaginative powers of man to such an extent that it becomes dangerous to tamper with when the rights of others are involved.

Minnesota.—*Francis v. West. U. Tel. Co.*, 58 Minn. 252, 59 N. W. 1078.

Mississippi.—*West. U. Tel. Co. v. Rogers*, 68 Miss. 748, 13 L. R. A. 859n, 9 So. 823, 24 Am. St. Rep. 300; *West. U. Tel. Co. v. Watson*, 82 Miss. 101; *Hartzog v. West. U. Tel. Co.*, 84 Miss. 448, 105 Am. St. Rep. 459, 34 So. 361. In this state the general rule has been modified to the extent that where the telegraph company has been guilty of a willful wrong or such negligence as amounts to a willful wrong, the plaintiff may prove his mental anguish in being prevented from being present at the deathbed or funeral of a relative and have it considered by the jury in fixing exemplary damages, although there has been no pecuniary loss or physical suffering.

Missouri.—*Connell v. West. U. Tel. Co.*, 116 Mo. 34, 22 S. W. 345; 20 L. R. A. 172, 38 Am. St. Rep. 575; *Burnett v. West. U. Tel. Co.*, 39 Mo. App. 599; *Denning v. Chicago, etc., R. Co.*, 80 Mo. App. 152; *Newman v. West. U. Tel. Co.*, 54 Mo. App. 434.

New York.—*Curtin v. West. U. Tel. Co.*, 13 N. Y. App. Div. 253, 3 N. Y. Annot. Cas. 286.

Ohio.—*Morton v. West. U. Tel. Co.*,

53 Ohio St. 431, 32 L. R. A. 735, 53 Am. St. Rep. 648; *Kline v. West. U. Tel. Co.*, 4 Ohio Dec. 224, 3 Ohio M. P. 143; *Kester v. West. U. Tel. Co.*, 4 Ohio Cir. Dec. 410, 8 Ohio Cir. Ct. 286.

Oklahoma.—*Butner v. West. U. Tel. Co.*, 2 Okla. 234, 37 Pac. 1087.

Pennsylvania.—*Kightlinger v. West. U. Tel. Co.*, 20 Pa. Co. Ct. 630.

South Carolina.—*Lewis v. West. U. Tel. Co.*, 57 S. C. 325, 35 S. E. 556. The rule in this state has been changed by statute, permitting damages in such cases. (§ 23, Stat. 748; Code (1902), Vol. I, § 2223.) This statute was held to be constitutional in *Simmons v. West. U. Tel. Co.*, 63 S. C. 429.

Virginia.—*Connelly v. West. U. Tel. Co.*, 100 Va. 51, 56 L. R. A. 663, 93 Am. St. Rep. 919, 40 S. E. 601; *Tyler v. West. U. Tel. Co.*, 54 Fed. 634. In this state a statute was passed upon the subject which apparently failed of its purpose.

West Virginia.—*Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026.

Wisconsin.—*Summerfield v. West. U. Tel. Co.*, 87 Wis. 1, 57 N. W. 973.

⁶⁷ *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026.

§ 594. When may be basis of action—malicious or willful wrong.

There are instances where damages may be recovered for mental suffering disconnected from other losses; and yet this is in the nature of punitive damages, or a punishment imposed on the wrongdoer. Thus, if the company's operator is guilty of such gross negligence in the discharge of his duties as amounts to a willful wrong, whereby another suffers agony or a distress of mind, the company would be liable in damages for such wrong.⁶⁸ It is exacted of the company more to deter others from committing other and similar offenses than as a compensation for the mental suffering endured.⁶⁹ If an agent of a telegraph company should be guilty of such gross negligence as to indicate a wanton or malicious purpose in failing to transmit and deliver a message, the person injured thereby would be entitled to exemplary damages, although he might not have sustained any loss except a worry and distress of mind.⁷⁰ So, in actions for libel and slander, they will be liable in damages to the injured person, since in such cases malice is an essential element. When, however, the words are not actionable per se, there must be proof of special damages. If, on the other hand, they are actionable per se, they have a sure tendency to degrade the citizen in the estimation of his fellows, which results in damages to his social influence and business efficiency.⁷¹ When this is the case, it does not devolve upon him to prove other injuries except that endured by the mind. The wrongful act complained of may have been done in good faith but if the subsequent acts of the company indicate a total disregard of the rights of others, it would still be liable. It would be liable in damages for mental suffering in cases of assault or assault and battery. It was formerly held that a corporation could not be guilty of a wrong, where the element of criminal intent was necessary to constitute the wrong, but this doctrine has long since been refuted.

⁶⁸ West. U. Tel. Co. v. Rogers, 68 Miss. 748, 24 Am. St. Rep. 300, 9 So. 823, 13 L. R. A. 859n.

⁶⁹ Scott v. Jarnague on Tel. §§ 417, 418; Southern Kansas R. Co. v. Rice, 38 Kan. 398.

⁷⁰ West. v. West. U. Tel. Co., 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807.

⁷¹ Chapman v. West. U. Tel. Co., 88 Ga. 763, 17 L. R. A. 430, 15 S. E. 901, 30 Am. St. Rep. 186; West. U. Tel. Co. v. Rogers, 68 Miss. 748, 24 Am. St. Rep. 300, 9 So. 823, 13 L. R. A. 859n.

§ 595. Reasons for not allowing such damages.

The general rule, under the common law, and that followed by the preponderance of authority is, that mental suffering, unaccompanied by other losses or injuries, is not sufficient grounds upon which to maintain an action against a telegraph company for the recovery of damages therefor, in consequence of a negligent transmission or delivery of a message, although it was informed at the time the message was accepted for transmission that mental anguish and suffering would be the result. The best reasons found in our research on this subject were given by Judge Lurton in a dissenting opinion, and as they are so clearly and satisfactorily stated, we take pleasure in quoting them at this place: "The reason an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous condition, the suffering of one under precisely the same circumstances would be no test of the sufferings of another. Vague and shadowy, there is no possible standard by which an injury can be justly compensated or even approximately measured. Easily simulated and impossible to disprove, it falls within all the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as a mere compensation to the plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority. . . . It is legitimate to consider the evils to which such a precedent logically leads. Upon what sound legal considerations can this court refuse to award damages for injuries to the feelings, mental distress and humiliation where such injury results from the breach of any contract? Take the case of a debtor who agrees to return the money borrowed on a certain day, who breaches his agreement willfully with knowledge that such breach on his part

will probably result in the financial ruin and dishonor of his disappointed creditor. Why shall not such a debtor, in addition to the debt and the interest, also compensate his creditor for this ruin, or at least for his mental suffering? . . . Upon what principle can we longer refuse to entertain an action for injured feelings consequent upon the use of abusive and defamatory language not charging a crime or resulting in special pecuniary damages? Mental distress is or may be in some cases as real as bodily pain, and it as certainly results from language not amounting to an imputation of crime, yet such actions have always been dismissed as not authorized by the law as it has come down to us, and as it has been for all times administered."⁷²

§ 596. Same continued—other reasons—nominal damages.

Some of the courts which hold the first view commented upon—that damages may be recovered for mental anguish—claim that there must be nominal damages, in order to recover damages for mental anguish, but this fact cannot be entertained, since, nominal damages necessarily deny any further recovery. The inconsistency of such a palpable reason is too great to be considered. If damages for mental suffering may be recovered where there is no other loss, then there is no need of the injured person having to suffer nominal damages; but if it is necessary that he should have sustained nominal damages, however slight they may be, then damages cannot be recovered for mental suffering unaccompanied by other loss.⁷³ But there must be a

⁷² *Wadsworth v. West*, U. Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 875.

⁷³ *Chapman v. West*, U. Tel. Co., 88 Ga. 763, 17 L. R. A. 430, 15 S. E. 901, 30 Am. St. Rep. 190.

In this case the court said: "The case *West, U. Tel. Co. v. Rogers*, 68 Miss. 748, 9 So. 823, 13 L. R. A. 859n, 24 Am. St. Rep. 300, suggests that the doctrine it opposes would open up a new field of litigation. This is worthy of remark. Except in Texas, suits like this have been infrequent

in the past. If their foundation principle be sanctioned, they are likely to multiply indefinitely. Nowhere can be found any satisfactory suggestion of a principle to restrain such suits within reasonable limits. How much mental suffering shall be necessary to constitute a cause of action? Let some of the courts favoring recovery measure out the quantity. If they are unable to do this, then, on principle, any mental suffering would be actionable, the degree of it merely determining the *quantum* of damages. The

greater loss than mere nominal damages in order to recover for the worry or distress of the mind. If pecuniary loss has been sustained, damages over and above this loss should in some instances, be awarded in the nature of punitive damages. In fact and in truth there are but one class of cases—in the absence of malice and willful wrong⁷⁴—in which damages should be awarded for mental suffering and anguish. Where both the mind and body suffers from the same cause, damages, in a sense, should be awarded for both. “The mind is as much a part of the body as the bones and muscles, and an injury to the body includes the whole, and its effects are inseparable.”⁷⁵ Where mental pain is therefore an element of physical pain; or is a necessary consequence of physical pain; or is the natural and prox-

cases do suggest as a restriction that the plaintiff must be entitled to damages on some other ground, or to nominal damages at least; in other words, there must be an infraction of some legal right for the plaintiff; then the damages may be increased for the mental suffering. If the plaintiff must be entitled to substantial damages on other grounds, then mental suffering alone is not the ground for damages, which is the very point contended for. To speak of the right to nominal damages as a condition for giving substantial damages is a palpable contradiction. To give nominal damages necessarily denies any further recovery. It is said there must be an infraction of some legal right, attended with mental suffering, for this kind of damages to be given. If this be true law, why is not mental distress always an item to be allowed for in the damages? We have seen that, though allowed in some, it is in many cases excluded. Every man knows that the violation of any material right is necessarily productive of more or less pain of mind. Then why not compensate it in every instance where a right

has been violated? In no case whatever are damages recoverable, unless a legal duty has been broken. By the test proposed, it is first granted that mental suffering alone is not actionable; then a case arises in which there is no actionable damages, unless mental suffering be such, when it is simply assumed that it is actual damages. Throwing away the lame pretense of basing recovery or mental suffering upon an otherwise harmless transgression, and stripping it of all false form and confusing technicality, it is manifest that to allow such a recovery, in real substance, is an effort to protect feeling by legal remedy.”

“Where personal security or personal liberty is infringed, the mental suffering seems to be a necessary component in the injury: *Chapman v. West. U. Tel. Co.*, 88 Ga. 763, 17 L. R. A. 430, 15 S. E. 901, 30 Am. St. Rep. 187. But mental suffering alone is not such an infringement of the rights as to justify damages therefor: *Id.*

⁷⁵ *Connell v. West. U. Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 584.

mate result of the physical injury, then damages for mental suffering may be recovered where the injury had been caused by the negligence of defendant.⁷⁶ Thus, where the message is a summons to a physician to attend a sick person, but on account of the company negligently delaying the message the physician failed to reach the patient, in consequence of which the patient suffers great physical and mental pain and anguish, in such cases damages should be awarded for the mental suffering.

§ 597. Same continued—mental suffering following physical pain.

It seems, in those cases where damages may be recovered for mental suffering accompanying physical pain, that the former suffering must be an element of the latter and not the cause of it. Thus, where fright caused by the negligence of the defendant was so great and sudden as to immediately produce physical sickness and suffering, it was held that damages could not be recovered. The principle upon which this was held was, that for the mere mental suffering there could be no recovery, and the physical injury was too remote, being unlikely to result from the wrongful act.⁷⁷ It was held in another case, however, that fright causing nervous convulsions and illness was a ground for damages. But even here, the action was sustained on account of the physical injury as the proximate result of the negligent act and not on account of the intervening mental suffering, conceding that this alone would not warrant recovery.⁷⁸

§ 598. Conflict of law—with respect to mental damages.

We have had an opportunity elsewhere to discuss, in a general way, the law applicable to contracts made for the transmission and delivery of messages sent from one state to another, and where there was a conflict of the laws in respect to such transmission in the two states. So, we shall at this place say something on the subject with

⁷⁶ *West v. West*, U. Tel. Co., 39 Kan. 93, 7 Am. St. Rep. 533.

⁷⁷ *Victorian R. Co. v. Coultas*, L. R. 13 App. C. 222; *Fox v. Borkey*, 126 Pa. St. 164, 17 Atl. 604; *Ewing v. Pittsburg, etc., R. Co.*, 147 Pa. 40, 14

L. R. A. 666n, 23 Atl. 340; *Lehman v. Brooklyn, etc., R. Co.*, 47 Hun 355; *Allsop v. Allsop*, 5 Hurl. & N. 534.

⁷⁸ *Purcell v. St. Paul City R. Co.*, 59 N. W. (Minn.) 1034.

respect to the recovery of damages for mental suffering, where such damages are allowed in one state and not in the other. It is very often the case that messages are sent from one state in which such damages are allowed, into another where such are not permitted to be recovered; and the question which presents itself under these circumstances is, By what laws should the contract of sending be enforced? The general rule on this subject is that the laws of the state in which the contract was made, or is to be performed, should control, unless it is understood that those of the other should control. Under the rulings of the courts in those states which permit a recovery of damages for mental anguish or suffering, such damages may be recovered for the negligent transmission or delivery of a message sent into these states from those which refuse to allow such damages.⁷⁹ The same rule applies where the messages are sent from the states to those which do not permit such recovery, when the action is brought in the former states. So, also, damages may be recovered in the state where the message is sent, although it is to be delivered in a state which does not allow a recovery of such damages.⁸⁰ But if both the states, from and to which the message is sent, refuse to allow damages for mental suffering, such cannot be recovered, although the suit is brought in a state which does allow such damages, and one through which the company has a line.⁸¹ It seems that the statutes, in those states permitting a recovery of such damages, raise the duty of these companies above that assumed in the contract of sending, and base their reasons upon the fact that a public duty has been violated and for which damages may be recovered either at the place of sending or receiving. Mr. Thompson said, in discussing this particular subject: "The true view which seems to sustain the right of action in the receiver of the message, or in the person addressed, when it is not delivered, is one which elevates the question above the plane of mere privity of contract, and places it where it belongs, upon the public duty which the telegraph company owes to any person bene-

⁷⁹ *Gray v. West. U. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301n, 91 Am. St. Rep. 706; *West. U. Tel. Co. v. Blake*, 68 S. W. (Tex.) 526.

⁸⁰ *Bryan v. West. U. Tel. Co.*, 133 N. C. 603, 45 S. E. 938; *West. U. Tel.*

Co. v. Waller, 74 S. W. (Tex.) 752, reversing 72 S. W. 264; *West. U. Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591.

⁸¹ *Thomas v. West. U. Tel. Co.*, 25 Tex. Civ. App. 398, 61 S. W. 501.

ficially interested in the message, whether the sender or his principal, where he is agent, or the receiver, where he is agent.”⁸²

§ 599. Rule declared by statutes.

In concluding this chapter, we beg leave to make some suggestive remarks in regard to this very important subject. The reason that the common law rule has been adhered to by not allowing a recovery of damages for mental suffering and anguish unaccompanied by other losses, has doubtless had the tendency to cause these companies, through their employees, to be more derelict in their duties. What we desire to say, is, that there should be some means by which this failure of duty on their part might be prevented. As has been seen, by following the rule of the common law, there can never be a remedy exercised; then the only way through which the same may be reached is by some statutory amendment to the rule of the common law. There are statutes adopted in some states, and which are discussed in another part of this work, declaring the right to recover such damages. And while it seems that the courts in these states take cognizance of the rule laid down in the *So Relle* case, yet their decisions rest principally upon the statutes under which the action is brought.⁸³ The constitutionality of these statutes was tested in South Carolina, and it was there held that they were not in conflict with the constitution of that state.⁸⁴ We do not desire to be understood as saying that we altogether approve of the nature of these statutes; but we do most earnestly approve the spirit and purpose for which they were adopted. While there should be some check placed on these companies for failing to discharge their duties in regard to the transmission of such messages, which we have been discussing, yet we are unable just now to make a suggestion as to how it may be done by statutory laws, unless it is done by some kind of a statutory penalty.

⁸² Thompson on the Law of Elect., § 427.

⁸³ *Wadsworth v. West. U. Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864.

⁸⁴ *Simmons v. West. U. Tel. Co.*, 63 S. C. 425, 57 L. R. A. 607, 41 S. E. 521. See, also, *Butler v. West. U. Tel. Co.*, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893.

CHAPTER XXV.

DAMAGES CONTINUED—EXEMPLARY OR PUNITIVE— EXCESSIVE AND NOMINAL.

- § 600. In general—meaning of term.
- 601. Same as applied to corporations.
- 602. Done by agents and employees—malice.
- 603. Whether a question of fact or law.
- 604. The purpose of such damages.
- 605. Assault and battery.
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§ 600. In general—meaning of term.

Having discussed at some length in the preceding chapters the measure of damages arising in different cases brought against telegraph companies, we shall now say something further in regard to the same subject, but more particularly with respect to the kinds and amount of damages; and, first, we shall discuss such as are exemplary or punitive, or such as are imposed on these companies by way of punishment. Punitive, vindictive and exemplary damages are synonymous terms in legal contemplation.¹ Exemplary damages apply to those wrongs which, beside the violation of a right or the actual damages sustained, import insult, fraud or oppression, and are injuries inflicted in the spirit of wanton disregard, and not merely injuries.² While there has been some discussion between law-writers

¹ Herfurth v. Washington, 6 D. C. 74 Am. Dec. 406; Bixby v. Dunlap, 56 99; Lowry v. Coster, 91 Ill. 182; N. H. 456, 22 Am. Rep. 475.

Koerner v. Oberly, 56 Ind. 284, 26 Am. ² New Orleans, etc., R. Co. v. Stath- Rep. 34; Chiles v. Drake, 2 Mete., 146, am, 42 Miss. 607, 97 Am. Dec. 478;

as to whether this kind of damages was intended as a personal punishment to the offender, or as a lesson to the public,³ the better doctrine is that such damages are given as a punishment to the offender, for the benefit of the public and as a restraint to the transgressor.⁴ Actions for the recovery of such damages can only be sustained where there is malice, fraud or gross negligence engendered in the commission of the act, and, in order to warrant a recovery of such, there must enter into the injury some element of aggravation, or some coloring of insult or malice that will take the case out of the ordinary rule of compensation; if there is a want of any of these elements, the measure of damages is the measure of compensation for the loss sustained and nothing more.⁵ The question as to whether an act was willful, wanton or malicious relates only to damages and not to the right of recovery; and if the act complained of can be so classified, the jury is authorized by law to award such damages.⁶ It must be understood that this rule applies only when the action is brought in tort, for only actual damages can be recovered for a breach of a contract, although the defendant willfully disregarded compliance with such contract.⁷ There is one exception, however, to this latter rule:

Zimmerman v. Bonzar, 16 Atl. (Pa.) 71; *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *So. R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

³ *Wright v. Donnell*, 34 Tex. 291. See, also, *So. R. Co. v. Barr*, 55 S. W. 900, 12 Ky. L. Rep. 1615.

⁴ *Burns v. Campbell*, 71 Ala. 271; *St. Louis Consol. Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Ward v. Ward*, 41 Iowa 686; *Kansas City, etc., R. Co. v. Kier*, 41 Kan. 661, 21 Pacific 770, 13 Am. St. Rep. 311; *Edwards v. Ricks*, 30 La. Ann. 926; *New Orleans* 40 Miss. 395; *Millard v. Brown*, 35 N. Y. 297; *Rippee v. Miller*, 33 N. C. 247; *Cole v. Tucker*, 6 Tex. 266; *Borland v. Barnett*, 76 Va. 128, 44 Am. Rep. 152; *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58;

Press Pub. Co. v. Munroe, 73 Fed. 196, 19 (C. C. A.) 429, 51 L. R. A. 353.

⁵ *Kelly v. McDonald*, 39 Ark. 387; *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93; *Biloxi City R. Co. v. Maloney*, 74 Miss. 738, 21 So. 561; *Chicago, etc., R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Chicago, etc., R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661.

⁶ *Kirton v. North Chicago St. R. Co.*, 91 Ill. App. 554.

⁷ *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844; *Haber, etc., Hat Co. v. Southern Bell Tel. Co.*, 118 Ga. 874, 45 S. E. 696; *Stuart v. West. Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623; *West. U. Tel. Co. v. Brown*, 58 Tex. 170, 44 Am. Rep. 610; *McAllen v. West. U. Tel. Co.*, 70 Tex. 243, 7 S. W. 715; *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026.

that is, where the action is brought for the breach of promise of marriage.⁸

§ 601. Same as applied to corporations.

At one time, on account of the inability of corporations to entertain an evil intent, it was held that punitive or exemplary damages could not be imposed upon them. In fact they were not held liable for a tort. But "the law of remedies against corporations originated when those artificial bodies were few, and those few were, in the main, such as were created for municipal purposes. As corporations multiplied, created chiefly for purposes of trade, the obstacle in the way of the attainment of justice, which arose out of principles applicable only to municipal corporations, have gradually been removed" and swept away.⁹ A corporation is now held just as liable for an act, when committed either with or without an evil intent, so far as it may have been done while acting within the scope of its authority, as if the act had been committed by an individual.¹⁰ So, they may be liable for all their torts, and this liability may be enforced in the same manner and way as if the wrong complained of had been committed by a natural person.¹¹ It has sometimes been questionable whether damages for punishment could be given in civil cases.¹² In the state of Washington it has been adjudged that the principle for allowing such damages was unfair and unsound, and they are not, therefore, allowed in that state, although the corporation may have

⁸ Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275.

⁹ Dock v. Elizabethtown Steam Mfg. Co., 34 N. J. L. 312; New York, etc., R. Co. v. Schuyler, 34 N. Y. 30. See, also the monographic note to Orr v. Bank of the United States, 13 Am. Dec. 596; Hussey v. Norfolk So. R. Co., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312 and note.

¹⁰ Atlantic, etc., R. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; International, etc., R. Co. v. Tel., etc., Co., 69 Tex. 277, 5 Am. St. Rep. 45; Spellman v. Richman, etc., R. Co., 35 S.

C. 475, 14 S. E. 947, 28 Am. St. Rep. 855; Samuels v. Richmond, etc., 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883.

¹¹ Cooley on Torts 120; Peebles v. Patapasco Guano Co., 77 N. C. 233; Hayes v. Houston R. Co., 46 Tex. 272; Lee v. Village of Sandy Hill, 40 N. Y. 442; Orr v. Bank of the United States, 1 Ohio 36, 13 Am. Dec. 588 and note; Hussey v. Norfolk So. R. Co., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312 and note.

¹² Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270.

been guilty of gross negligence.¹³ It has been held that damages by way of punishment merely cannot be recovered in any case.¹⁴ In Colorado, punitive damages cannot be recovered against a corporation in a civil action, although the wrong complained of was willfully committed.¹⁵ The great weight of authority is, however, that such damages may be recovered against a corporation in civil actions, and the remedy is just as enforceable against them as if the same act was that of a natural person.¹⁶ It is further held that the right to recover such damages is not confined to one kind of actions, but that they may be recovered in case, as well as in trespass.¹⁷

§ 602. Done by agents and employees—malice.

Corporations are liable in exemplary or punitive damages for such acts done by their agents or employees while acting within the scope of their employment, as if the same act was done by an individual acting for himself;¹⁸ and when such damages are allowed, they should be proportioned to the actual damages sustained.¹⁹ As said, there must be some element of malice in order to recover these damages, but it is not necessary that there be actual malice.²⁰ Malice of a corporation may be shown by proving the motives of its directors, in the same way that the motives of other associated or conspiring bodies are proved.²¹ Malice, in its legal sense, means a wrongful act, done intentionally, without just cause or excuse; and the malice of the agent or employee of a corporation, in this sense, is the malice of the

¹³ *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 11 L. R. A. 689n, 26 Am. St. Rep. 842, 25 Pac. 1072.

¹⁴ *Stuyvesant v. Wilcox*, 92 Mich. 233, 31 Am. St. Rep. 580, 55 N. W. 662.

¹⁵ *Greely, etc., R. Co. v. Yeager*, 11 Colo. 445.

¹⁶ *Spellman v. Richmond, etc., R. Co.*, 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 858 and note; *Hoboken Printing Co. v. Kahn*, 59 N. J. L. 218, 35 Atl. 1053, 59 Am. St. Rep. 590 and note.

¹⁷ *Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287.

¹⁸ *Magouirk v. West. U. Tel. Co.*, 79 Miss. 632, 89 Am. St. Rep. 663; *Atlantic Great Western R. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382.

¹⁹ *International, etc., R. Co. v. Tel., etc., Co.*, 69 Tex. 277, 5 S. W. 517, 5 Am. St. Rep. 45.

²⁰ *Spellman v. Richmond, etc., R. Co.*, 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 858 and note.

²¹ *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439.

corporation.²² The act of an officer, agent or servant of a corporation, when committed within the scope of his authority and employment, is the act of the corporation, and his negligence is its negligence.²³ Corporations only act through their agents and employees, and if the latter entertained no evil intent, the former could not be liable for a criminal act; for, without this, the criminal intent could not be entertained by the corporation. In a sense, the servant of the corporation is the life, or that which creates life in the latter. Therefore, there must be an element of fraud, violence, outrage, wanton recklessness, malice, evil intent or oppression forming part of the wrongful act of the agent or employee; and if there is not shown any circumstance of aggravation, and no evil motive is imputed in the agent as forming a part of his actual or apparent duties, vindictive or punitive damages should not be awarded against the corporation.²⁴

§ 603. Whether a question of fact or law.

In cases brought against corporations—and of course we include in these, telegraph and telephone companies—to recover exemplary or punitive damages, it is sometimes difficult to determine whether the facts involved are such as should be left to the consideration of the court, or should be given to the jury under proper instructions. It is generally held, that whether there is or is not evidence in any particular case which would warrant exemplary or vindictive damages, is a question for the court to determine; but its sufficiency to establish such fact, is a matter for the consideration of the jury.²⁵ In such actions as these, it is the privilege and the duty of the court to determine whether there is sufficient evidence to support the allegations, but it cannot go further and announce to the jury in its instructions, that there is or is not enough evidence adduced to support the issue. In the trial of the case, if it is shown by the

²² *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 872.

²³ *Hopkins v. Atlantic, etc., R.*, 36 N. 36 H. 9, 72 Am. Dec. 287.

²⁴ *New Orleans, etc., R. Co. v. Stat-ham*, 42 Miss. 607, 97 Am. Dec. 478; *Mackoon v. Citizens' R. Co.* 40 Mo. 79; *Philadelphia, etc., R. Co. v. Hoefflich*,

62 Md. 300, 50 Am. Rep. 223; *Chicago v. Martin*, 49 Ill. 241, 95 Am. Dec. 590; *Toledo, etc. R. Co. v. Patterson*, 63 Ill. 304; *McFee v. Vicksburg, etc., R. Co.*, 42 La. Ann. 790, 7 So. 720.

²⁵ *Samuels v. Richmond, etc., R. Co.*, 35 S. C. 493, 28 Am. St. Rep. 883, 14 S. E. 943.

proper evidence that the act complained of "was wantonly and willfully inflicted, or with such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness, the court will instruct the jury that they are at liberty to find for the plaintiff, in addition to a compensation for the injury actually sustained, such a sum as the circumstances justify."²⁶ But, if on the other hand, there is not sufficient evidence to impute willfulness, wantonness or a disregard for the rights of others, the court on proper request may instruct the jury that the evidence is not sufficient to warrant them in assessing exemplary damages.²⁷ Some courts have held, that the jury should not be instructed on the question of vindictive damages in cases clearly not warranting its application, on account of the great abuses to which this doctrine may be used.²⁸

§ 604. The purpose of such damages.

The purpose in awarding exemplary damages is to compensate the plaintiff for the wrong done him, and at the same time to punish the corporation for committing such wrong, and to deter it and others from repeating such acts.²⁹ On account of the nature of corporations, the manner in which they must be punished for the wrongful acts, is different from that generally imposed on individuals or natural persons for the same act. It is not necessary to furnish a jury with the data from which they can ascertain with reasonable certainty the extent of the damages to be awarded, but the amount of such is at the discretion of the jury within reasonable limits. If there is sufficient evidence adduced to warrant a verdict for exemplary damages, the pecuniary condition of the corporation may be shown, since by this means the extent of the punishment to be inflicted in every particular case can only be ascertained. Exemplary damages inflicted on a corporation as a means of punishment for its wrongful acts, may be excessively great on account of its small wealth, but at the same time the same amount of damages would.

²⁶ *Id.*

²⁷ *Pittsburg, etc., R. Co., v. Slasser*, 19 Ohio St. 157; *Toledo, etc., R. Co. v. Patterson*, 63 Ill. 304.

²⁸ *Samuels v. Richmond, etc., R. Co.*,

35 S. C. 493, 28 Am. St. Rep. 883, 14 S. E. 943.

²⁹ *Cumberland, etc., Tel. Co. v. Poston*, 94 Tenn. 696.

on another corporation which represents much greater capital, be considered a small punishment. But the fact must not be lost sight of that, in all cases of this kind, the jury is to be governed wholly by the malice or wantonness of the corporation as shown by its conduct,³⁰ and they may take into consideration the injury to the plaintiff's feelings and the loss of his credit in estimating exemplary damages.³¹

§ 605. Assault and battery.

The general rule of common carriers is that they are answerable for the malicious and wanton acts of their servants to a passenger, whether done in the line of their employment or service or not, provided the same is done during the discharge of their duty to the master which relates to the passenger. They, as common carriers, owe the duty toward their passengers to protect them against the insults of their servants.³² Telegraph companies are made common carriers by statutes in many states, but there is a distinction to be drawn between these two kinds of carriers with respect to the present issue; however, we do not think that the distinction is material in the present discussion. One is a common carrier of passengers, and is entrusted with the person of the individual to whom it owes the duty of protection; the other is only entrusted with the property of the person. While the carrier owes this duty to the passenger only when he is a passenger, yet it is not necessary for him to be in actual transit or on board the vehicle furnished for his transportation in order to constitute him a passenger. If he has made arrangements for passage and is within the premises of the company in readiness of departure, as where he is in the depot or waiting-room, he is nevertheless a passenger within the meaning of the terms. We have been unable to find a case against a telegraph company touching on this particular point, but we can easily imagine instances where such cases could occur. For instance,

³⁰ *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200.

³¹ Note to *Burnham v. Cornwell*, 63 Am. Dec. 545; *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547.

³² *Goddard v. Grand Trunk R. Co.*, 57

Me. 202, 2 Am. Rep. 39; *Hoboken Print., etc., Co. v. Kahn*, 59 N. J. L. 218, 59 Am. St. Rep. 592; *Richmond, etc., R. Co. v. Jefferson*, 89 Ga. 554, 32 Am. St. Rep. 87 and note.

if a person is within the office or exchange of a telegraph or telephone company, transacting or for the purpose of transacting business with respect to the transmission of news, or engaging its employment, and while there the agent or servant of the company commits an assault and battery upon such person, which is done while acting within the apparent discharge of his duty to the company relative to the services of employment, the company would be liable for such act. We shall presume to go further in the discussion of this subject by saying that we do not think it necessary that such person should be within the premises of the company; but if he is accompanying one of the servants of the company to the office or exchange for the purpose of answering a call, and is in the apparent protection of the servant as such, an assault by such servant, will be considered that of the company. For instance, suppose that the servants of the telephone company conspire to commit an assault on a strange lady in a small town, and in order to accomplish their purpose they put in a false call at night for her. To answer said call, it becomes necessary for the latter to go to the exchange, and, according to the plans of the conspiracy, one of the servants offers to and does accompany her to the exchange. On reaching the exchange the supposed person calling her cannot be found and she then returns, in the company of the servant, to her stopping place. If while enroute an assault is committed on her by said servant, the company would undoubtedly be liable.

§ 606. Libel.

While all corporations may be civilly liable for a libel,³³ yet the opportunities more often present themselves for such acts to be committed by telegraph companies than by most any other kind of corporation, unless it be a publishing company. Their express purpose is to transmit news, and most often such as is libelous is made public by means of these companies. As is known, the publishers of a libel are as guilty as the author himself, and whenever one or more per-

³³ *Belo v. Fuller*, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75; *Fogg v. Boston, etc., R. Corp.*, 148 Mass. 513, 20 N. E. 109, 4 L. R. A. 382n, 12 Am. St. Rep. 583; *Evening Journal Assn. v.*

McDermott, 44 N. J. L. 430, 43 Am. Rep. 392; *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539, 27 Am. Rep. 293.

sons, other than he on whom the calumny is cast, sees the libelous words, this is sufficient publication. It seems that it is not necessary that some third person, disconnected from the company, should have seen the libelous words in order to make a publication, but if the servants of the company see them, this is sufficient. So, in an action against a telegraph company for libel, the jury would be authorized to give such exemplary damages as the circumstances required, if the evidence shows that the publication was the result of that reckless indifference to the rights of others which is equivalent to the intentional violation of them.³⁴ When malice on the part of the company is established as a fact in such cases, either actually or by presumption or inference of facts from the libelous character of the publication, exemplary damages may be recovered.³⁵ If, however, there is no evidence that the company published the libel carelessly, maliciously or wantonly, exemplary or punitive damages cannot be recovered.³⁶ The damages sustained must be more than merely nominal, and if the jury should find that this is the only loss suffered, they would not be justified in awarding punitive damages;³⁷ but, if it is shown that the publication was maliciously made to bring reproach upon the plaintiff's business or domestic relations, damages other than nominal will be presumed and exemplary damages may be recovered.³⁸ It is not necessary that the publication be made by means of transmission of news, but if it is done carelessly, recklessly or maliciously in any other way by its servants while acting within the scope of their authority, it will be liable. For instance, suppose a telephone company negligently prints the name of one of its subscribers in the directory,

³⁴ *Morning Journal Assn. v. Ruth-
erford*, 51 Fed. 513, 16 L. R. A. 803;
Cooper v. Sun Print., etc., Assn., 57
Fed. 566.

³⁵ *Childers v. San Jose, etc., Pub.
Co.*, 105 Cal. 284, 38 Pac. 903, 45 Am.
St. Rep. 40.

*Philadelphia, etc., R. Co. v. Quig-
ley*, 21 How. 202; *Missouri Pac. R. Co.
v. Richmond*, 73 Tex. 568, 11 S. W.
555, 15 Am. St. Rep. 794, 4 L. R. A.
280n.

³⁷ *Schippel v. Norton*, 38 Kan. 567,

16 Pac. 804; *West. U. Tel. Co. v. Cross*,
74 S. W. 1098.

When plaintiff makes out a case entitling him to recover the price paid for transmission, that is a showing of actual damages which will warrant allowance of exemplary damages if a wilful injury or gross negligence is shown: *West. U. Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283.

³⁸ *West. U. Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300, 13 L. R. A. 859n, 9 So. 823.

so as to indicate that he is a different person from that which he really is, and these are afterwards published or distributed—against the said person's consent—to the other subscribers by the servants in a malicious manner and in utter disregard of consequences, the company will be liable.

§ 607. Malicious prosecution.

A telegraph company may be held liable for a malicious prosecution conducted by its agents and officers, just as if it were a natural person, and, in such cases, where it is shown that the case was maliciously prosecuted, exemplary or punitive damages may be recovered. "The old doctrine was," said Judge Campbell, "that a corporation was not so liable, because malice is the gist of the action, and it was said that malice could not be imputed to a mere legal entity, which having no mind could have no motive and therefore no malice, and this narrow view still prevails to some extent. But the steady process of judicial evolution has led to the establishment in some of the courts of the just doctrine of the civil responsibility of a corporation for the acts of the sentient persons who represent it, and through whom it acts, and of the liability of a corporation for the acts of its agents, under the conditions that attach to individuals."³⁹

§ 608. Trespass—accompanied with malice.

It is necessary that bad motives be involved in order that exemplary damages may always be recovered in actions of tort against a corporation. They are not recoverable for every trespass made by a corporation on other's lands, but only where it is committed through malice, or is accompanied by threats, oppression or rudeness to the owner or occupant, can they be recovered. Punitive damages are not allowed where the trespass has been made in good faith or by mistake as to authority, otherwise they will be.⁴⁰ Thus, in one case the employees of a telephone company went to the owner of a tree which was standing in front of his house to get permission to

³⁹ *Williams v. Printers' Ins. Co.*, 57 Miss. 759, 34 Am. Rep. 494 and note. *ber Co.*, 115 N. Car. 648, 20 S. E. 718; *Silver Creek, etc., Co. v. Mangum*, 64 Miss. 682.

⁴⁰ *Waters v. Greenleaf-Johnson Lum-*

trim it, so as to stretch a line of wire along the street. On refusal of the owner to grant such permission, if they wait until he leaves home and then trim the tree, the company will be liable, and in addition to the actual damages sustained, to punitive damages;⁴¹ or, if they wait until night to take advantage of such right, the company will be liable to exemplary or punitive damages. Should the company's servants trespass upon the land of another, against his consent in the construction of a line of wires, and in doing so destroy his crops adjoining the right of way, the company will be liable in punitive damages.⁴² In other words, the company will be liable for the unlawful trespass of its servants committed while in the discharge of their duty toward the company, just the same as the servants would be if they were acting for themselves.

§ 609. Negligence—question for jury.

Exemplary or punitive damages cannot be recovered from a telegraph company for injuries to the person caused by the mere negligence of its servants or employees; so, a jury would be unwarranted in awarding such damages, where it is shown that the injury is the result of nothing more than negligence on the part of the servants.⁴³ Thus, a mere refusal by a telephone company to furnish a long distance connection, will not justify the allowance of exemplary damages. Such damages are only allowed for personal injuries, when the wrong is wantonly and willfully inflicted, or with such gross want of care and regard for the rights of others as to justify the presumption of wantonness or willfulness.⁴⁴ In other words, the injury must be the direct result of the act of the agents, where they have been guilty, not only for want of ordinary care, but of that entire want of care which would raise the presumption of a conscious indifference

⁴¹ See § 125.

⁴² *Id.*

⁴³ *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 S. E. 844; *Haber, etc., Hat Co. v. Southern Bell Tel. etc., Co.*, 118 Ga. 874, 45 S. E. 696; *Stuart v. West. U. Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623; *West. U. Tel. Co. v. Brown*, 58 Tex. 170, 44 Am. Rep. 610; *McAllen*

v. West. U. Tel. Co., 70 Tex. 243; *Davis v. West. U. Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026.

⁴⁴ *Magouirk v. West. U. Tel. Co.*, 79 Miss. 632, 31 So. 206, 89 Am. St. Rep. 663; *Lewis v. West. U. Tel. Co.*, 57 S. C. 325, 35 S. E. 556. See also *Butler v. West. U. Tel. Co.*, 65 S. C. 510, 44 S. E. 91.

to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.⁴⁵ Thus, it has been held, that punitive damages can be recovered where a messenger boy intentionally fails to deliver a message.⁴⁶ Whether there is or is not sufficient evidence adduced to disclose wanton and gross negligence, it is not only a privilege but the duty of the court, by proper request, to instruct the jury that they may⁴⁷ or may not award punitive damages as the case may be.⁴⁸ It is a question for the jury on being properly instructed, to determine whether, from the evidence, the degree of care exercised amounts to the degree of gross negligence to constitute the act as willfully or wantonly committed.⁴⁹

§ 610. Same continued—against telegraph companies.

All that has been said in this chapter with respect to exemplary damages, applies with equal force to telegraph companies. Thus, exemplary, punitive or vindictive damages may be recovered against a telegraph company for a failure to transmit and deliver a message, where there is such gross negligence on the part of the agents or employees of the company as to indicate wantonness or a malicious purpose in failing to transmit and deliver it.⁵⁰ So also, if the agent of the company who receives a reply message for transmission, knows the

⁴⁵ West. U. Tel. Co. v. Seel, 115 Ala. 670, 22 So. 474; West. U. Tel. Co. v. Cunningham, 99 Ala. 314, 14 So. 579; West v. West. U. Tel. Co., 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807; Southern Kan. R. Co. v. Rice, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766; West. U. Tel. Co. v. Lawson, 66 Kan. 660, 72 Pac. 283; West. U. Tel. Co. v. Watson, 33 (Miss.) 76; Young v. West. U. Tel. Co., 65 S. C. 93, 43 S. E. 448; West. U. Tel. Co. v. Frith, 105 Tenn. 167, 58 S. W. 118; West. U. Tel. Co. v. Morris, 77 Tex. 173, 13 S. W. 888; Gulf, etc., R. Co. v. Levy, 59 Tex. 542, 46 Am. Rep. 69. Where

the gross negligence is the employment of an incompetent agent and it appears that the agent referred to had never been negligent before, exemplary damages are not recoverable: West. U. Tel. Co. v. Karr, 5 Tex. Civ. App. 60.

⁴⁶ Butler v. West. U. Tel. Co., 65 S. C. 510, 44 S. E. 91.

⁴⁷ Kansas Pac. R. Co. v. Kessler, 18 Kan. 523.

⁴⁸ Chicago R. Co. v. Curr, 59 Miss. 456, 42 Am. Rep. 373.

⁴⁹ Southern, etc., R. Co. v. McLendon, 63 Ala. 266, 14 So. 579; Bannon v. Baltimore, etc., R. Co., 24 Md. 108.

⁵⁰ See note 45.

urgent necessity for promptness in forwarding it, but delays sending it off until the next morning, it is a question for the jury to decide whether this was not such gross negligence as evinced an utter disregard of plaintiff's feelings and rights, and if they so determine, punitive damages may be awarded.⁵¹ If the employees of the company negligently allow the wires to fall on the wires of an electric light company, and to remain there hanging down, the company will be liable in exemplary damages to one injured by accidentally coming in contact with the wires, if the employees acted in a spirit of mischief or criminal indifference, and it was known to the company's managers; or, if the managers did not exercise proper care in selecting the employees, or if they knew, or had means of knowing, that they were not skillful, prudent or careful, it would still be liable.⁵² A telegraph company cannot, however, be held answerable in exemplary damages for an injury occasioned by its servants or employees, in the absence of willful or malicious conduct or intentional wrong.⁵³ So, a telegraph company is not answerable in exemplary damages on account of the mere failure of its agents to find the addressee of a message, where it is not shown that the company had knowledge of the incompetency of its agents when they were employed, or that they were retained after it was known.⁵⁴

§ 611. Same continued—actual damages.

In cases brought against telegraph companies to recover punitive damages for injuries resulting from the willful acts of their servants or employees, it is necessary to show that actual damages have been sustained. While this is the rule, yet the amount of damages sustained may be very small. Thus, it was held that when the plaintiff makes out a case entitling him to recover the price paid for transmission, this is a sufficient showing of actual damages to warrant the

⁵¹ *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 So. 579; *Butler v. West. U. Tel. Co.*, 62 So. C. 22, 40 S. E. 162, 89 Am. St. Rep. 893, 55 L. R. A. 414.

⁵² *Henning v. West. U. Tel. Co.*, 41 Fed. 864.

⁵³ *West. U. Tel. Co. v. Eyser*, 91 U. S. 495, note reversing 2 Colo. 141; *Erie Tel. Co. v. Kennedy*, 80 Tex. 71.

⁵⁴ *West. U. Tel. Co. v. Karr*, 5 Tex. Civ. App. 60, 24 S. W. 302.

allowance of exemplary damages, if a willful injury or gross negligence is shown.⁵⁵ If, however, mental suffering has been the result of injury to the character or reputation of one of the parties to a forged telegram sent by the company's agent, while acting within the scope of his authority or employment, it is not necessary that actual damages be sustained.⁵⁶

§ 612. Excessive damages.

We shall not comment to any great extent upon the subject of excessive damages, since there is no difference in the application of the rules of law on this subject as regards actions brought against telegraph and telephone companies and those brought for the same causes against other corporations and individuals;⁵⁷ and to treat the subject as it should be, would necessarily consume much valuable time and encumber the pages of this work with matter foreign to the object for which it was prepared. Damages, as has been said elsewhere, are regarded as a compensation for infringement of the rights of others; and when not connected with matters of aggravation or malice, they are considered as matter within the discretion of the jury, under proper instructions by the court,⁵⁸ and an appellate court will seldom interfere with the verdict when rendered. The general rule on this point as expressed by Judge Story is, "that a verdict will not be set aside in a case of tort for excessive damages, unless the court can clearly see that the jury has committed some very gross and palpable error, or has acted under some improper bias, influence or prejudice, or has totally mistaken the rules of law, by which the damages are to be regulated."⁵⁹ In such cases, the court should con-

⁵⁵ West. U. Tel. Co. v. Lawson, 66 Kan. 660, 72 Pac. 283.

⁵⁶ Magouirk v. West. U. Tel. Co., 79 Miss. 632, 31 So. 206, 89 Am. St. Rep. 663.

⁵⁷ West. U. Tel. Co. v. McCall, 9 Kan. App. 886, 58 Pac. 797; Peterson v. West. U. Tel. Co., 75 Minn. 368, 74 Am. St. Rep. 502, 43 L. R. A. 581.

⁵⁸ Birmingham R. etc., Co. v. Baird, 130 Ala. 234, 30 So. 556, 89 Am. St.

Rep. 43, 54 L. R. A. 752; Wynne v. Atlantic Ave. R. Co., 156 N. Y. 702, 51 N. E. 1094; New Orleans, etc., R. Co. v. Schneider, 60 Fed. 210, 8 C. C. A. 571; Missouri Pac. R. Co. v. Texas, etc., R. Co., 33 Fed. 803; Montreal Gas Co. v. St. Lawrence, 26 Can. Supreme Ct. 176.

⁵⁹ Whipple v. Cumberland Mfg. Co., 29 Fed. Cas. No. 17516, 2 Story 661.

sider all the circumstances surrounding the case and consider therefrom whether the verdict is fair and reasonable; and it will be presumed that they are fair and reasonable, unless they are clearly so excessive or outrageous with reference to those circumstances as to demonstrate that the jury have acted against the rules of law or has allowed their passions and prejudices to overcome their better judgment.⁶⁰ As said, the court, in determining the question as to whether or not damages which have been awarded are excessive, must be guided by the circumstances of each particular case; but if it clearly appears that the jury has mistaken the law, or has allowed their feelings or bias in the case to misled them, the court should not hesitate to set the verdict aside.⁶¹

§ 613. When rule invoked.

It is seldom that this rule is invoked, except in cases where damages for mental suffering is claimed. In one case, falling under this rule, it was held that \$600 was not excessive where the delayed message was one requesting the presence of a physician, and in consequence of the delay, the sufferings of plaintiff's wife in confinement were prolonged about two hours.⁶² In a case similar to this, it was held that \$950 was not excessive.⁶³ On account of the non-delivery of a message requesting a ticket, plaintiff complained that he was compelled to walk and steal rides from Grand Junction, Colorado, to Lovelock, Nevada. An allowance of \$1,250 was held excessive. In another case, it appeared that the plaintiff was a commercial news agent in Cincinnati, engaged in furnishing to customers financial news and reports for New York City as to the state of the market. He alleged a willful and malicious breach of contract on the part of the telegraph company. The verdict was for \$3,000, though the actual damages appeared to be not more than five hundred. The court

⁶⁰ *Ottawa v. Sweely*, 65 Ill. 434; *Harris v. Louisville, etc.*, R. Co., 35 Fed. 116; *Walker v. Erie R. Co.*, 63 Barb. 260.

⁶¹ *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 872, 8 Pac. 780; *Standard Oil Co. v. Tierney*, 92 Ky. 367, 17 S. W. 1025,

13 Ky. L. Rep. 626, 36 Am. St. Rep. 595, 14 L. R. A. 677.

⁶² *West. U. Tel. Co. v. Cooper*, 20 S. W. (Tex.) 47, affirming 71 Tex. 507, 10 Am. St. Rep. 772, 1 L. R. A. 728.

⁶³ *West. U. Tel. Co. v. Church*, 90 N. W. 878, 57 L. R. A. 905.

ordered the amount to be reduced by a remittitur of \$2,000, holding, however, that the plaintiff had a right to more than the actual damages sustained.⁶⁴

§ 614. Same continued—mental suffering—excessive.

As said in the preceding section, the question of excessive damages is seldom questioned, except in cases in which damages for mental suffering are claimed. In these cases, the damages awarded are sometimes so flagrantly great that courts can easily see that the jury was biased, prejudiced or failed to understand the law applicable to the case. Thus, where the company failed to promptly deliver a message to a mother asking her to come to her sick son, and by reason of the delay she did not see him until after his death, whereas she would have been able to have seen him fully twenty-four hours before death if the message had been promptly delivered, it was held that a verdict of \$5,000 in favor of the plaintiff was so excessive as to shock the sense of justice, and to clearly indicate that the jury were influenced by passion or prejudice.⁶⁵ In another case the son, on account of non-delivery of a message, was prevented from reaching his father in the latter's sickness until his father was unconscious. He was with him, however, for several days before his death. The father was 73 years old, and his son 50, and an unusual strong affection was shown to have existed between them. It was held that a verdict of \$4,750 was excessive.⁶⁶ Each of these cases cited and approved another case where a verdict of \$4,500 was held excessive, the evidence showing that a message sent to a boy's father was delayed, and by reason of the delay the father was kept away from the bedside of his dying son.⁶⁷ Other cases will be found in notes where damages were held excessive.⁶⁸

⁶⁴ *West. U. Tel. Co. v. Rosentretter*, 80 Tex. 406, 16 S. W. 25.

⁶⁵ *Stuart v. West. U. Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623.

⁶⁶ *West. U. Tel. Co. v. Piner*, 1 Tex. Civ. App. 301, 21 S. W. 315.

⁶⁷ *West. U. Tel. Co. v. Houghton*, 82 Tex. 561, 15 L. R. A. 129n, 17 S. W. 846.

⁶⁸ *Tennessee-West. U. Tel. Co. v. Mellon*, 100 Tenn. 429 (\$500.00); *Railroad Co. v. Griffin*, 92 Tenn. 694 (\$900.00). *Texas*.—*West. U. Tel. Co. v. Evans*, 1 Tex. Civ. App. 297, 21 S. W. 266 (\$5,000.00); *West. U. Tel. Co. v. Berdine*, 2 Tex. Civ. App. 517 (\$1,999.99); *West. U. Tel. Co. v. Douchell*, 28 Tex. Civ. App. 23, 67 S. W. 159 (\$1,250; remittitur of \$750 ordered).

§ 615. Same continued—not excessive.

Where a message announced the death of plaintiff's sister, and by its being delayed he was prevented from attending her funeral and from being able to "give comfort and consolation to his aged mother in her hour of great trouble," an award of \$1,000 was considered not excessive.⁶⁹ It was held in another similar case, that \$1,168 was not excessive compensation for the mental anguish suffered.⁷⁰ The company's negligence prevented plaintiff from being at the bedside of his dying brother and from attending his funeral, and \$2,500 as actual damages for mental suffering were held not to be excessive.⁷¹ It would be a difficult and useless undertaking to enumerate all the cases where damages for mental suffering were held not to be excessive. While a case having similar features involved may be used as a guide in determining whether the damages are excessive, yet on account of the circumstances attending each case being different in some particular, a perfect and safe guide cannot be resorted to, but each particular case must be decided on its own merits. Other cases are cited in the note below where damages were held not excessive.⁷²

⁶⁹ *West. U. Tel. Co. v. Rosentretter*, 80 Tex. 406, 16 S. W. 25.

⁷⁰ *West. U. Tel. Co. v. Broesche*, 72 Tex. 654, 3 Am. St. Rep. 843.

⁷¹ *Stuart v. West. U. Tel. Co.*, 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623.

⁷² *Alabama*.—*West. U. Tel. Co. v. Sneed*, 115 Ala. 670, 22 So. 474 (\$1,500); *West. U. Tel. Co. v. Crocker*, 135 Ala. 492, 59 L. R. A. 398 (\$225); *West. U. Tel. Co. v. Cunningham*, 99 Ala. 314, 14 So. 579 (\$500).

Indiana.—*West. U. Tel. Co. v. Stratemeier*, 6 Ind. App. 125 (\$500); *West. U. Tel. Co. v. Newhouse*, 6 Ind. App. 442 (\$400); *West. U. Tel. Co. v. Cain*, 14 Ind. App. 115 (\$225).

Kentucky.—*West. U. Tel. Co. v. Fisher*, 107 Ky. 513, 54 S. W. 830 (\$300); *West. U. Tel. Co. v. McIlvoy*, 107 Ky. 633, 55 S. W. 428 (\$1,000).

Tennessee.—*West. U. Tel. Co. v. Fifth*, 105 Tenn. 167, 58 S. W. 118.

(\$1,500 including punitive damages); *West. U. Tel. Co. v. Robinson*, 97 Tenn. 638, 37 S. W. 545; 34 L. R. A. 431n (\$500).

Texas.—*West. U. Tel. Co. v. Evans*, 5 Tex. Civ. App. 55, 23 S. W. 998; *West. U. Tel. Co. v. Karr*, 5 Tex. Civ. App. 60, 24 S. W. 302 (\$100); *West. U. Tel. Co. v. Zane*, 6 Tex. Civ. App. 585 (\$1,950); *West. U. Tel. Co. v. Hill*, 26 S. W. 252 (\$500); *West. U. Tel. Co. v. Porter*, 26 S. W. 866 (\$1,000); *West. U. Tel. Co. v. Kensley*, 8 Tex. Civ. App. 527, 28 S. W. 831 (\$750); *West. U. Tel. Co. v. O'Keef*, 29 S. W. 1137 (\$1,000); *West. U. Tel. Co. v. Guest*, 33 S. W. 281 (\$450); *West. U. Tel. Co. v. Russel*, 12 Tex. Civ. App. 82, 33 S. W. 708 (\$1,500); *West. U. Tel. Co. v. Johnson*, 16 Tex. Civ. App. 546, 41 S. W. 367 (\$400); *West. U. Tel. Co. v. Thompson*, 18 Tex. Civ. App. 279, 44 S. W. 402 (\$200);

§ 616. Nominal damages.

Under the rule of the common law, only actual damages could be recovered where an actual loss had been sustained, but it is now well settled that, where there is an infringement of a legal right, nominal damages may be awarded, although there is no evidence of actual damages having been sustained.⁷³ Damages are not always merely pecuniary, but an injury imports damages where a person is thereby deprived of his rights.⁷⁴ Where the evidence shows that a person's legal rights have been violated, the claim to damages accrues; and the fact that the precise nature and extent of the damages is not capable of being exactly ascertained, will not serve to divest him of his rights to recover,⁷⁵ nor will such rule be affected by the fact that the damages are so small that they cannot be readily estimated.⁷⁶ In such cases, if the plaintiff has suffered some loss, but it is so small that the jury cannot ascertain the amount, but nevertheless renders a verdict for the defendant, the court may permit the plaintiff to have a verdict for nominal damages.⁷⁷ The rule in these particulars, will not be affected by the fact that the plaintiff has been benefited by the wrong;⁷⁸ nor by the fact that the loss has been subsequently repaired;⁷⁹ nor, that the action is brought in contract or in tort.⁸⁰ In actions against telegraph companies, the cost of sending the message, if it has been paid, is always recoverable, although no substantial

West. U. Tel. Co. v. Trice, 48 S. W. 770 (\$1,000); West. U. Tel. Co. v. Patton, 55 S. W. 973 (\$1,000); West. U. Tel. Co. v. Norris, 25 Tex. Civ. App. 43, 60 S. W. 982 (\$1,000); West. U. Tel. Co. v. Rice, 61 S. W. 327 (\$750); West. U. Tel. Co. v. Griffin, 27 Tex. Civ. App. 306, 65 S. W. 661, (\$750); West. U. Tel. Co. v. James, 73 S. W. 79 (\$1,995); West. U. Tel. Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627 (\$780).

⁷³ Stein v. Burden, 24 Ala. 130, 60 Am. Dec. 433; Thompson v. New Orleans, etc., R. Co., 50 Miss. 315, 19 Am. Rep. 12; New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. 841, 28 Am. St. Rep. 575.

⁷⁴ Ashby v. White, 2 Ld. Raym. 938 3 Ld. Raym. 320.

⁷⁵ Seaboard Mfg. Co. v. Woodson, 98 Ala. 378, 11 So. 733; Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415.

⁷⁶ Glass v. Garber, 55 Ind. 336; Seneca Road Co. v. Auburn, etc., R. Co., 5 Hill. (N. Y.) 170.

⁷⁷ Feize v. Thompson, 1 Taunt. 121.

⁷⁸ Watts v. Weston, 62 Fed. 136, 10 C. C. A. 302; Williams v. Brown, 76 Iowa 643, 41 N. W. 377.

⁷⁹ Dow v. Humbert, 91 U. S. 294, 23 L. Ed. 368.

⁸⁰ Havens v. Hartford, etc., R. Co., 28 Conn. 69; Wild v. Orleans, 12 La. Ann. 15.

damages are proven, provided a breach of the company's duty is shown, but not otherwise.⁸¹ There cannot be an infringement of the sender's legal rights unless the company is guilty of a breach of some of its duties, and it is error for the court to instruct the jury that the plaintiff is, in any event, entitled to recover the cost of sending the message, since this fact depends upon the proof of the negligence of the company.⁸²

⁸¹ West. U. Tel. Co. v. Lawson, 66 Kan. 660, 72 Pac. 283; Kennon v. West. U. Tel. Co., 126 N. C. 232, 35 S. E. 468; Thompson v. West. U. Tel. Co., 106 N. C. 549, 11 S. E. 269.

⁸² Thompson v. West. U. Tel. Co., 106 N. C. 549, 11 S. E. 269.

CHAPTER XXVI.

STATUTORY PENALTY.

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§ 617. Object and purpose.

We have already made a somewhat lengthy discussion in regard to the rights to recover from a telegraph company damages actually sustained as a result of errors negligently made in the transmission or delivery of a message concerning business transactions, and the inability to recover any other damages in the absence of proof of some loss. We have also discussed the right to recover damages from these

companies for mental suffering and anguish in consequence of a failure to promptly deliver messages containing announcements of certain affairs; and the unsoundness of the doctrine upon which actions brought for this purpose were maintained; and we have elsewhere commented somewhat upon the inadequacy of the common-law remedies to recover damages for every wrong or failure of duty of these companies, on account of their peculiar nature; and, also made some suggestions as to how this inadequacy could be and was to a certain extent overcome by statutes amending the common-law rule. So, we shall now discuss statutes of this nature which have been adopted in some of the states of the Union. On account of the inadequacy of the common-law remedy to enforce the duty of these companies, in every particular, with respect to the transmission and delivery of messages—particularly in cases in which, from their nature, substantial damages are not recoverable—statutes have been adopted in many states, providing for the recovery of a fixed money penalty from these companies for a negligent failure to properly discharge their duty. The duty designed to be enforced by these statutes is threefold in its nature: first, to transmit messages tendered for that purpose with the charges established by the rules of the company; second, to receive and transmit such messages with impartiality as to the order of transmission; and third, to transmit and deliver such messages in good faith and with due diligence.¹

§ 618. Construction of statutes—in general—penal.

The object of these statutes is to fix a penalty upon telegraph companies for a breach of duty which they owe to the public generally, and not to assess a certain fixed amount of damages for the non-performance of a contract to properly transmit a dispatch.² They, then, being in the nature of penal statutes, or enacted for the purpose of fixing a penalty on these companies for a breach of public duty, must be strictly construed. The word “penalty,” means a fine or punishment imposed upon anyone for a violation of some duty which the wrongdoer is under obligations to perform, and all statutes which en-

¹ *Burnett v. West. U. Tel. Co.*, 39 Ark. 78, 6 S. W. 236; *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Mo. App. 607.

² *Frauenthall v. West. U. Tel. Co.*, 50 Rep. 692.

croach upon the personal or property rights of any person, operates in the nature of a punishment and must therefore be strictly construed.³ So, each statute must be considered separately in its own light, and only that which is expressly stated therein can be enforced.⁴ It is not our purpose, however, to be understood as saying that the cause of action is made out altogether by one statute, but that only such construction can be placed on each, separately, as is expressly stated in it. It is often the case that one statute makes out the cause of action, while another imposes the penalty for the violation of the first. To be more explicit in that which has been said, a statute which provides that, on failure to promptly transmit a message, the company shall be liable for a certain fixed penalty; a recovery of the penalty could not be had, by showing that the company negligently or incorrectly transmitted the message, or where it provides that the penalty shall be imposed where there is a negligent transmission, and the action is to recover the penalty on an oral message, or the failure to promptly deliver a written one, the penalty cannot be recovered; neither can there be a recovery by the addressee where the statute provides that the sender shall maintain such suits; but the rule is otherwise, if it provides that the party aggrieved may recover.

§ 619. Same continued—intention of statute—must not be defeated by construction.

It is generally held, that these statutes must be strictly construed, yet that construction must not be placed on them which will defeat the manifest purpose of the legislature in enacting them.⁵ There are

³ *Pelham v. Steamboat Messenger*, 16 La. Ann. 99; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *Chalker v. Chalker*, 1 Conn. 79. 6 Am. Dec. 206; *McAfee v. Southern R. Co.*, 36 Miss. 669; *Brady v. Northwestern Ins. Co.*, 11 Mich. 451; *Baltimore, etc., Tel. Co. v. Lovejoy*, 48 Ark. 301.

⁴ *Connell v. West. U. Tel. Co.*, 116 Mo. 34, 20 L. R. A. 172, 38 Am. St. Rep. 575, 22 S. W. 345.

⁵ *Arkansas*.—*Frauenthall v. West. U. Tel. Co.*, 50 Ark. 78.

California.—*Thurn v. Alta Tel. Co.*, 15 Cal. 473.

Georgia.—*Langley v. West. U. Tel. Co.*, 87 Ga. 777, 13 S. E. 904; *Greenburg v. West. U. Tel. Co.*, 89 Ga. 754, 15 S. E. 651.

Indiana.—*West. U. Tel. Co. v. Ax-tell*, 69 Ind. 199; *Hadley v. West. U. Tel. Co.*, 115 Ind. 191; *West. U. Tel. Co. v. Roberts*, 89 Ind. 377; *West. U. Tel. Co. v. Kilpatrick*, 97 Ind. 42.

different degrees of strictness to be placed on penal statutes;⁶ and it seems that, on account of the objects for which these were enacted, the most strict degree should not be insisted upon by the courts. It is the object in the construction of penal, as all other statutes, to ascertain the true legislative intent; and, while the courts will not apply such statute to cases which are not within the obvious meaning of the language employed by the legislature, even though the cases may be within the mischief intended to be remedied,⁷ they will not, on the other hand, apply the rule of strict construction with such technicalities as to defeat the purpose for which the statute was enacted.⁸ As said at first, the object of these statutes is to provide a remedy for the enforcement of duties and obligations which these companies owe to the public generally, and which are not recognized by the common-law remedies; on account of this, and for the further fact that it has become absolutely necessary that some remedy should be provided for, in order that these companies may not become derelict in their duties toward the public, these statutes should not be construed in the strictest degree, and the purpose and intention of the legislature is that they shall not be.⁹ Thus, where a statute provides that on failure of a telegraph company to correctly transmit and promptly deliver all messages tendered to it for transmission, the latter will be liable to a penalty to the party aggrieved, a construction of this statute in its strictest terms would mean that the message should have been delivered to the company in writing, and the same has been so

Iowa.—Taylor v. West. U. Tel. Co., 95 Iowa 740, 64 N. W. 660.

Mississippi.—Wilkins v. West. U. Tel. Co., 68 Miss. 6, 8 So. 678; Cumberland, etc., Tel. Co. v. Sanders, 35 So. 653.

South Dakota.—Kirby v. West. U. Tel. Co., 4 S. Dak. 463.

Georgia.—Moore v. West. U. Tel. Co., 87 Ga. 613, 13 S. E. 639. Compare Horn v. West. U. Tel. Co., 88 Ga. 538, 15 S. E. 16.

Missouri.—Thompson v. West. U. Tel. Co., 32 Mo. App. 191.

Virginia.—West. U. Tel. Co. v. Powell, 94 Va. 278, 26 S. E. 829.

⁶ United States v. Hartwell, 6 Wall. (U. S.) 395; State v. McCrystal, 43 La. Ann. 907, 9 So. 922; State v. Archer, 73 Md. 44.

⁷ Crosby v. Hawthorn, 25 Ala. 221; Parkinson v. State, 14 Md. 184, 74 Am. Dec. 522; State v. Walsh, 43 Minn. 444; Doggett v. State, 4 Conn. 61, 16 Am. Dec. 100; United States v. Wiltberger, 5 Wheat. (U. S.) 76.

⁸ See note 6.

⁹ West. U. Tel. Co. v. Wilson, 16 Am. & Eng. Corp. Cas. 259; West. U. Tel. Co. v. Meredith, 8 Am. & Eng. Corp. Cas. 54; West. U. Tel. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692.

held;¹⁰ but the circumstances of the case may be such as to give a less degree of strict construction, so as to warrant a recovery of the penalty, although the message was telephoned to the operator.¹¹

§ 620. A penalty—not damages—for person injured.

The penalty provided by these statutes is different from those imposed for the commission of a crime. In these latter statutes, the wrong or crime is one committed more directly against the state, and for this reason the penalty should go to the state. In those statutes enacted for the express purpose of enforcing the duties which telegraph companies owe to the public, the wrong inflicted is more of a personal injury, or one in which the injured party is more directly concerned, and, for this reason, the penalty is one to be recovered by him.¹² It must be understood that the penalty is not damages, or a compensation to be recovered for the loss sustained by the injured person, but it is purely a penalty. It is imposed particularly as a punishment on the company for a breach of its duty, and to be an object lesson to others, and, at the same time, the injured person is peculiarly benefited for the wrong.

§ 621. Who maintain suit.

As will be seen in another part of this work, the sender under the English rule could only maintain an action against a telegraph company for a breach of a contract of sending, since the privity of contract only existed between the sender and the company. This rule has not been followed in our states, but the sendee, under the American rule, can sue as well the sender.¹³ With respect to who shall maintain the action, under these statutes, the statutes themselves must be referred to in order to ascertain this fact. While the statutes are similar in nature, yet the wording of each is not always the same, and the least difference in the wording might cause quite a different construction to be placed on each. Thus, some of these stat-

¹⁰ *Cumberland, etc. Tel. Co. v. Sanders*, 35 So. 653; *Wilkins v. West. U. Tel. Co.*, 68 Miss. 6, 8 So. 678.

¹¹ *West. U. Tel. Co. v. Jones*, 69 Miss. 658, 30 Am. St. Rep. 579, 13 So. 471.

¹² *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 697.

¹³ *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 697.

utes provide that, on a failure of a prompt delivery, the sender of the message may recover a certain penalty. It has been held, under these, that no one except the sender could maintain the action.¹⁴ In other statutes, it is provided that any person, or any one injured by such failure of duty, may recover the penalty. Under these provisions, either the sender or the addressee may recover the penalty when the default is shown.¹⁵ It is on account of the strict construction placed on these statutes that these different rules are adhered to. If the statute fails altogether to provide by whom the action may be brought, it has been held that the rules applicable in an ordinary action for damages apply.¹⁶

§ 622. Extraterritorial effect—not any.

It is the general rule that when a liability imposed by the statute of a state is in its nature a penalty, such liability cannot be enforced beyond the state in which the statute was enacted; or, in other words, such statutes have no extraterritorial effect. As said, these statutes are penal and, independently of the constitutional question in this connection, cannot be enforced beyond the limits of the state enacting them.¹⁷ It is not meant by this, however, that these statutes can only

¹⁴ *Tel. Co. v. Brown*, 108 Ind. 538; *Hadley v. West. U. Tel. Co.*, 115 Ind. 191.

¹⁵ *West. U. Tel. Co. v. Allen*, 66 Miss. 549, 6 So. 461.

¹⁶ *Hadley v. West. U. Tel. Co.*, 115 Ind. 191.

¹⁷ *United States*.—*West. U. Tel. Co. v. Texas*, 105 U. S. 464, reversing *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692.

Arkansas.—*Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79.

Georgia.—*West. U. Tel. Co. v. Michaelson*, 94 Ga. 436, 21 S. E. 169.

Iowa.—*Taylor v. West. U. Tel. Co.*, 95 Iowa 740, 64 N. W. 660.

Mississippi.—*Alexander v. West. U. Tel. Co.*, 66 Miss. 161, 5 So. 397, 3 L. R. A. 71, 14 Am. St. Rep. 556.

Missouri.—*Rixke v. West. U. Tel. Co.*, 96 Mo. App. 406, 70 S. W. 265, 2 L. R. A. 78n; *Connell v. West. U. Tel. Co.*, 108 Mo. 459, 18 S. W. 883.

New York.—*Hearn v. West. U. Tel. Co.*, 36 Misc. (N. Y.) 557.

Tennessee.—*West. U. Tel. Co. v. Mellon*, 100 Tenn. 429.

In Indiana, the contract of sending must have been made in that state: *Carnahan v. West. U. Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175; *Rogers v. West. U. Tel. Co.*, 122 Ind. 395, 17 Am. St. Rep. 373; *West. U. Tel. Co. v. Reed*, 96 Ind. 195. And the breach must not have occurred in another state: *West. U. Tel. Co. v. Carter*, 156 Ind. 531, 60 N. E. 305, overruling *West. U. Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 693.

be enforced where the company has failed to discharge its duty with respect to the delivery of such messages as are transmitted wholly within the state; but if the message is sent from one state into another, and the wrong has been committed in the state of sending, the penalty may be recovered.¹⁸ It is held by some that the duty imposed by these statutes is a continuous one, and is not one performed by the company by merely discharging its duty with respect to messages transmitted within the state of this enactment. Judge Elliott said, while discussing this point: "The duty which the statute seeks to enforce is owing here in Indiana and not elsewhere; it was here that the contract was made which imposed the duty on the telegraph company, and it was here that the failure occurred, for the message was not transmitted, as the law commands, in good faith and with diligence and impartially. The duty which the company failed to perform was not a duty owing in Iowa, but was a duty owing in Indiana, where the parties executed the contract out of which the duty arose. The duty of the company did not end at the state line; it extended throughout the whole scope of the undertaking and required the message to be transmitted and delivered in good faith and with reasonable diligence to the person to whom it was sent. The breach of duty, no matter where the specific act constituting it occurred, was a breach here and not elsewhere. The duty is a general and a continuous one, and if not performed, irrespective of the place where the failure occurred, is a breach of the duty at the place of the creation."¹⁹ But this case has since been overruled*. It is held in Georgia that if the non-delivery to the sender was due to some default or other cause arising beyond the limits of the state in which it was received for transmission, recovery could not be had.²⁰ In Indiana, the penalty cannot be recovered if the contract of sending was made in another state, although the default may have occurred in that state.²¹

¹⁸ West. U. Tel. Co. v. James, 90 Ga. 254, 16 S. E. 83, affirming 162 U. S. 650; West. U. Tel. Co. v. Howell, 95 Ga. 194, 22 S. E. 286, 51 Am. St. Rep. 68; Butner v. West. U. Tel. Co., 2 Okla. 235.

¹⁹ West. U. Tel. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 693.

* West. U. Tel. Co. v. Carter, 156 Ind. 531, 60 N. E. 305.

²⁰ West. U. Tel. Co. v. Howell, 95 Ga. 194, 51 Am. St. Rep. 68, 30 L. R. A. 158, 22 S. E. 286.

²¹ Rogers v. West. U. Tel. Co., 122 Ind. 395, 17 Am. St. Rep. 373, 24 N. E. 157.

§ 623. Constitutionality of statutes.

The principal grounds upon which the constitutionality of these statutes have been attacked is, that to enforce such would be an interference with the exclusive power of Congress over interstate commerce. One reason why it was claimed that they were in violation of the clause of the federal constitution wherein the control of interstate commerce was vested in Congress was, that they applied only to telegraph companies and thereby denied these companies the equal protection of the law; but it has been held that while they apply to these companies, yet they apply equally to all companies of that class.²² Another reason for claiming that they were in violation of the federal constitution with respect to interstate commerce was, that they impaired the obligation of the contract of sending, in that they made a different liability from that assumed in the contract; but this reason, in so far as it applied to person other than the sender, has been held unfounded.²³ So, it is generally held, both by the state and the federal courts, that these statutes are not in conflict with the constitution of the United States, in so far as they interfere with Congress in the control of interstate commerce.

²² West. U. Tel. Co. v. Ferguson, 157 Ind. 37, 60 N. E. 679; West. U. Tel. Co. v. Mellon, 100 Tenn. 429. Elliott, J., while discussing the Indiana statute, said: "No discrimination is made in favor of any person, or in favor of any article of commerce, the freedom of commercial intercourse is not abridged, and no new duty or burden is imposed upon the company. The statute secures to all alike the privilege of demanding that the duties of a corporation be performed with diligence, impartiality and good faith. It enforces an existing duty, and provides a penalty, but it confines the duty to no class and denies the penalty to none. It is impossible to conceive the slightest restriction upon commercial intercourse, or the faintest discrimination in favor of any person or thing. Granting then the lack of power in the state to abridge the free-

dom of commercial intercourse, or discriminate in favor of the products of one state, or grant commercial rights to the citizens of some particular state and deny them to others, but we do maintain, that the sovereign state has power to enact laws requiring persons, artificial or natural, doing business within its borders, to transact that business with fairness, diligence and impartiality. A statute operating upon persons within the state declaring an existing duty, adding neither new nor additional ones, usurps no function of the Federal Congress, and infringes no constitutional provision:" West. U. Tel. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 694. See also Sherlock v. Alling, 93 U. S. 99; County of Mobile v. Kimball, 102 Id. 691.

²³ West. U. Tel. Co. v. James, 162 U. S. 650.

§ 624. Indiana statute.

The constitutionality of the Indiana statute²⁴ was assailed, but the court held that the statute was valid and constitutional, even when applied to messages sent to another state, and not violative of the United States constitution, giving to Congress the power to regulate commerce between the states, and that it was a valid exercise of the police power belonging exclusively to the state. On this point the court said: "The statute operates in favor of the sender of a message delivered to an office in this state, and upon a corporation represented within our borders by its agents and officers. The parties are, therefore, within our jurisdiction. The duty which the statute assumes to enforce is one arising in Indiana, for it grows out of and is founded upon an undertaking entered into in this state. The parties and subject-matter being within our jurisdiction, they are subject to our laws. Persons and property within the jurisdiction of a state are subject to the laws of that state."²⁵

§ 625. Character and form of message—"futures."

These statutes generally provide that, on failure to transmit or deliver *any* message, the company will be liable to a certain penalty: this means any and all messages irrespective of the form or character, provided they are not immoral, libelous or fraudulent. As it has been said elsewhere in this work, the object of these companies is not to perpetrate or assist in the perpetration of a crime, nor to do any act which would subject them to a civil action, and, of course, it follows that they would not be under any obligation to accept a message for transmission which, to do so, would make them liable to a civil or criminal action. If, then, a message is tendered for transmission, the company may refuse to transmit it, where it would have this effect, and still not be liable for the statutory penalty. It is not every message whose object is for an immoral or illegal purpose, or such as would support an action for damages against the company, that can be rejected by the company. Thus, where there is a message tendered for transmission which relates to transactions in "futures," the com-

²⁴ Stat. 4176, Rev. Stat. 1781.

²⁵ West. U. Tel. Co. v. Pendleton, 95 Ind. 12, 18 Am. Rep. 694.

pany would be under obligations to exercise the same care and promptness that it would over any other message;²⁶ unless there should be a statute which would make it illegal for such messages to be transmitted.

§ 626. Same continued—form—cipher telegrams.

As said, these statutes apply, with few exceptional cases, to all messages, and that whether they are intelligible or not. Messages are often written in cipher, the meaning of which is generally known only by the sender and the addressee. Where this is the case, the company, as we have elsewhere shown, may require the sender to inform it of the nature of the message; or, in other words, the sender should do this voluntarily in order that he may hold the company liable for any mishaps or losses sustained in its transmission. If the company has no information of the nature of the message, it would not be liable for all the consequences arising from a failure to transmit and deliver same. But, if the message should be written in cipher and accepted by the company, for transmission, the latter would be liable for the statutory penalty, if the message was not sent at all, although the company may not have had knowledge of its purpose or contents.²⁷ While the company may have refused to accept such message, yet, on the acceptance of it, the duty was then assumed. It is the assumption of the duty, and the failure to perform same, and not the form of the message, that makes out the case for the statutory penalty.

§ 627. Same continued—written on message blank—waiver of right.

One of the stipulations generally provided for by these companies is, that all messages must be written on the blank forms furnished by them. It is generally held by the courts that these stipulations are reasonable and are therefore enforceable. So, when a message is written on any paper other than these forms, the company's operator may refuse to accept same, and, in doing so, he would not sub-

²⁶ Gray v. West. U. Tel. Co., 87 Ga. 350, 14 L. R. A. 95, 13 S. E. 562, 27 Am. St. Rep. 259.

²⁷ Gray v. West. U. Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95.

ject the company to the statutory penalty.²⁸ If, however, the operator accepts such message, the fact that it was not written on one of the company's blanks will be no defense to an action to recover the penalty.²⁹ It is presumed, in such cases, that the company has waived the right acquired under the stipulation. But in order to hold the company, even under these state of facts, the operator must have known that the writing was a message. Thus, where the message was written on a piece of memorandum paper and handed to the operator by the sender's servant in such a casual way as not to indicate that it was a message for transmission, this fact will be a good defense under the statute.³⁰ In this instance, there would not be a presumption of a waiver of the right, unless the operator knew it was a message.

§ 628. Breach of duty—proof of.

Where the plaintiff brings an action against a telegraph company to recover the statutory penalty imposed for a failure to promptly transmit or deliver a message, he must prove the breach of such duty in order to recover.³¹ The statute being penal, the case must not only be one covered by such, and under which it is accurately described, but it must also be proved as alleged in the bill of complaint. In actions brought against these companies to recover damages as a result of their negligence, a *prima facie* case is made out when it is shown that the message was accepted by the company and that it was delayed in transmission or delivery an unreasonable time; or, that the message as received by the addressee was not the same as that delivered to the company. The same rule in this respect as in other cases against these companies applies in actions brought to recover the statutory penalty, except that it is not necessary to prove any loss.

²⁸ Kirby v. West. U. Tel. Co., 7 S. D. 323, overruling 4 S. Dak. 105, 46 Am. Rep. 765.

²⁹ West. U. Tel. Co. v. Jones, 69 Miss. 658, 30 Am. St. Rep. 579, 13 So. 471.

³⁰ West. U. Tel. Co. v. Liddell, 68 Miss. 1, 8 So. 510. See also West. U.

Tel. Co. v. Dozier, 67 Miss. 288, 7 So. 325.

³¹ West. U. Tel. Co. v. Wilson, 103 Ind. 308; West. U. Tel. Co. v. Ward, 23 Ind. 377, 85 Am. Dec. 462; West. U. Tel. Co. v. Liddell, 68 Miss. 1, 8 So. 510; Kirby v. West. U. Tel. Co., 7 S. Dak. 623.

§ 629. Same continued—amount of proof.

It has been held in some cases that the plaintiff must prove more than mere negligence on the part of the company, by showing that it acted in bad faith or willfully.³² It will be found, however, in the examination of the cases which hold such a rule, that there are only particular instances when this rule will apply. Thus, when the complaint is that the company unduly postponed the message in order to send others, or that the message was not accepted or would not be accepted, it must be shown that the acts of the company were willful or in bad faith. The contributory negligence of the sender in failing to give a sufficiently definite address, although it might be such as would afford a good ground for a defense to an action for failure to deliver, is not a defense where the action is based on the willful partiality of the company.³³ But if the action is to recover the penalty for failure to transmit or deliver a message, the proof of ordinary negligence on the part of the company is sufficient.³⁴

§ 630. Complaint and proof must fall under statute.

As has been elsewhere said, the cause of complaint and proof therefor must fall within the statute. Thus, a statute providing that the telegraph company shall transmit and deliver messages with "due diligence," and prescribing a penalty for a failure to comply with the terms of the statute, relates to the time within which messages must be transmitted and delivered, and not to the accuracy and correctness in sending and transcribing them, and the company is not liable, by virtue of the terms of the statute, for the penalty prescribed merely because it makes a verbal, though material, mistake and error in transcribing a message received and transmitted.³⁵ A

³² West. U. Tel. Co. v. Swain, 109 Ind. 405; West. U. Tel. Co. v. Brown, 108 Ind. 538; West. U. Tel. Co. v. Steele, 108 Ind. 163; Hadley v. West. U. Tel. Co., 115 Ind. 191; West. U. Tel. Co. v. Jones, 116 Ind. 361; Weaver v. Grand Rapids, etc., R. Co., 107 Mich. 300. See also Wichelman v. West. U. Tel. Co., 30 Misc. (N. Y.) 450.

³³ West. U. Tel. Co. v. Ferguson, 157 Ind. 37, 60 N. E. 679.

³⁴ Burnett v. West. U. Tel. Co., 39 Mo. App. 599; Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79; West. U. Tel. Co. v. Lindley, 89 Ga. 484, 15 S. E. 636; West. U. Tel. Co. v. Scirele, 3 Ind. 227.

³⁵ Wilkins v. West. U. Tel. Co., 68 Miss. 6, 8 So. 678; West. U. Tel. Co. v. Rountree, 92 Ga. 611, 18 S. E. 979. 44 Am. St. Rep. 93; West. U. Tel. Co. v. Pallotta, 81 Miss. 216.

case is not made out by showing that the company negligently failed to deliver a message, when the statute, under which the action is brought, imposes a penalty on these companies for negligence or refusal to receive and transmit messages promptly.³⁶ A refusal to transmit, for which the statute provides a penalty, is not shown by proof merely of a refusal to deliver after the message has been transmitted.³⁷ Nor is the intent of the statute complied with so as to justify a recovery of the penalty where it appears that the company made a bona fide effort to transmit the message and acted with impartiality, although the message was lost, and this, too, no matter how culpable may have been the conduct of the company by reason of which the loss occurred.³⁸ Where the statute imposes a penalty for the incorrect transmission of messages, a recovery cannot be had on the proof of a mere delay in transmission.³⁹

§ 631. Complaint—allegations therein.

To recover the statutory penalty, the complaint must aver facts which bring the case presented by it within both the letter and spirit of the statute.⁴⁰ Hence, the penalty cannot be recovered under the statute unless the complaint alleges and the proof shows that the defendant was engaged in business of telegraphing for the public.⁴¹ But it need not also appear that the company was engaged in telegraphing for hire.⁴² In a suit before a justice of the peace to recover the penalty, it was held that the complaint must aver and the evidence must prove that the sender of the message had paid or tendered the usual charges at the time of sending it. "Under the provisions of

³⁶ *Connell v. West. U. Tel. Co.*, 116 Mo. 34, 20 L. R. A. 172, 38 Am. St. Rep. 575.

³⁷ *Brooks v. West. U. Tel. Co.*, 56 Ark. 224; *Dubley v. West. U. Tel. Co.*, 54 Mo. App. 391; *Rixke v. West. U. Tel. Co.*, 96 Mo. App. 406. Compare *West. U. Tel. Co. v. Gouger*, 84 Ind. 106.

³⁸ *Frauenthal v. West. U. Tel. Co.*, 50 Ark. 78; *Baltimore, etc., Tel. Co. v. State*, 6 S. W. 513; *Weaver v. Grand Rapids, etc., R. Co.*, 107 Mich. 300, 65 N. W. 225.

³⁹ *West. U. Tel. Co. v. McLaurin*, 70 Miss. 26, 13 So. 36; *West. U. Tel. Co. v. McCormick*, 27 So. (Miss.) 606.

⁴⁰ *West. U. Tel. Co. v. Kinney*, 4 N. W. (Ind.) 512; *West. U. Tel. Co. v. Axtell*, 69 Ind. 199.

⁴¹ *West. U. Tel. Co. v. Trissal*, 98 Ind. 566; *West. U. Tel. Co. v. Ferguson*, 57 Ind. 499; *West. U. Tel. Co. v. Adams*, 87 Ind. 598.

⁴² *West. U. Tel. Co. v. Seirele*, 103 Ind. 227.

the statute . . . it is not every telegraph company which is subject to such penalty for such failure, but it is a telegraph company which has 'a line of wire wholly or partly in this state,' that is made amenable to the penalty prescribed by our statute for the failure to transmit a message, 'on payment or tender of the usual charge?'⁴³ It was held that the averment in the complaint that defendant "was engaged in the business of transmitting telegraphic messages for hire," was insufficient as being equivalent to an averment that the defendant was "engaged in telegraphing for the public," as required by the statute.⁴⁴ The court said: "A statute so highly penal must be construed strictly. The party claiming under it must bring his case clearly within the letter and spirit of the act. Keeping in mind the main purpose of the statute, its highly penal nature, and the rule of strict construction, we cannot hold that the words 'engaged in the business of transmitting telegraphic messages for hire' are equivalent to the words 'engaged in telegraphing for the public.' . . . A court cannot create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and the necessary meaning of the act creating it."⁴⁵ But the complaint need not negative the exceptions in the proviso, nor any facts of excuse; these must come from the defense. The exculpatory matter set forth in the statute need not be mentioned in the complaint, although available for the defense.⁴⁶ No actual damages need to be alleged and proved to recover the penalty under the statute. "The statute fixes the amount or penalty to be recovered, whether the actual damages be great or small."⁴⁷ A different rule prevailed under the common law, where it was necessary to allege and prove actual damages, otherwise nominal damages could only be recovered.⁴⁸

⁴³ West. U. Tel. Co. v. Ferguson, 57 Ind. 495.

⁴⁴ West. U. Tel. Co. v. Axtell, 69 Ind. 199.

⁴⁵ Id.

⁴⁶ West. U. Tel. Co. v. Gouger, 84 Ind. 176; West. U. Tel. Co. v. Ward, 23 Ind. 377; West. U. Tel. Co. v. Lewelling, 58 Ind. 367; West. U. Tel. Co. v.

Meek, 49 Ind. 53; West. U. Tel. Co. v. Buchanan, 35 Ind. 425, 9 Am. Rep. 744.

⁴⁷ Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79.

⁴⁸ 1 Sutherland on Damages, § 10; Hubbard v. West. U. Tel. Co., 32 Wis. 565.

§ 632. Actual damages—need not prove.

The penalty imposed by these statutes, as said, is a punishment inflicted for a violation of the company's duties, and is not in any sense a compensation as liquidated damages to the injured person. It has no reference to the actual loss sustained by him who sues for the recovery of the penalty, but is a means of punishing the company for its negligent acts and is only recoverable by the person injured by the negligence committed. As it is not damages, or in any sense such, it is not necessary to show that it is to be recovered as damages; nor is it necessary to prove that any actual damages have been sustained in order to recover the penalty. While it is not necessary to prove actual damages, yet if such is shown it will not affect the right to recover the penalty.⁴⁹ When the negligence has been sufficiently shown, the company will be liable for the penalty, although no loss has been sustained. The object of these statutes is to enforce the duties and obligations which these companies owe to the public generally; and when it is shown that they have failed to properly and promptly discharge them, the penalty may be recovered.

§ 633. Same continued—does not bar action for damages.

An action brought to recover the statutory penalty is based on a separate and distinct ground from that brought for the recovery of damages. One is maintainable on the ground that the company has failed to discharge its duty toward the public by neglect, refusal or failure as to time and the other is brought to recover damages sustained as a result of the negligence in transmission, by being inaccurate, or that the message is unreasonably delayed in delivery.⁵⁰

⁴⁹ Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79; West. U. Tel. Co. v. Cobbs, 47 Ark. 344, 1 S. W. 558, 58 Am. Rep. 756; West. U. Tel. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 698; West. U. Tel. Co. v. Adams, 87 Ind. 598, 48 Am. Rep. 776; West. U. Tel. Co. v. Ferguson, 157 Ind. 37; West. U. Tel. Co. v. Allen, 66 Miss. 549, 6 So. 461; Jacobs

v. Postal Tel. Cable Co., 76 Miss. 278, 24 So. 535.

⁵⁰ West. U. Tel. Co. v. Lindley, 89 Ga. 484, 15 S. E. 636; West. U. Tel. Co. v. Pendleton, 95 Ind. 12, 48 Am. Rep. 692; Hadley v. West. U. Tel. Co., 115 Ind. 191; Carnahan v. West. U. Tel. Co., 89 Ind. 526, 46 Am. Rep. 175; Wilkins v. West. U. Tel. Co., 68 Miss. 6, 8 So. 678. See also Stafford v. West. U. Tel. Co., 73 Fed. 273.

One is criminal in nature but civil in form, and the other is civil both in nature and in form. They, being founded on different grounds, may be instituted separately; and an action in one will not bar an action in the other. While these two actions are separate and distinct and are based on different grounds, yet the same act of the company may be the cause of both of the actions. For instance, if the statute provides that on failure to promptly deliver a message the company will be liable for a certain penalty, under this, if the company has failed to discharge its duty, it will be liable for the penalty; and if the plaintiff has sustained a loss in consequence of such delay, he may also recover the actual loss sustained thereby. As will be seen, the delay, in this instance, is the cause of both actions, but one is founded upon the statutory remedy for the enforcement of its duty with respect to the promptness as to time in the delivery and the other is founded on the fact of its violating its common-law duties or obligations and those assumed when the rights and benefits of a corporation were acquired. In some jurisdictions it is held that an action for the recovery of the penalty and a suit to recover the damages sustained as a consequence of such act, may be asserted in one suit.⁵¹ It has been held that, under these statutes, parties who have signed a dispatch jointly may bring a joint suit to recover the penalty for a failure to transmit the same.⁵²

§ 634. Actions survive.

In actions brought to recover the statutory penalty, the recovery is not based upon any injury to the person of the plaintiff. It is an action to enforce a right created by statute and does not belong to the class of actions where redress is sought for a personal injury. As is known, all actions for personal injuries die with the person, unless the rule is otherwise changed by statute. In these cases, brought for the recovery of the statutory penalty, the right of action does not die with the person injured by such act of the company, but survive.⁵³

⁵¹ West. U. Tel. Co. v. McLaurin, 70 Miss. 26, 13 So. 36; West. U. Tel. Co. v. McCormick, 27 So. (Miss.) 606.

⁵² West. U. Tel. Co. v. Huff, 3 West. Rep. (Ind.) 376.

⁵³ West. U. Tel. Co. v. Scirele, 10 Am & Eng. Corp. Cas. (Ind.) 610.

Under the common-law practice, the remedy in such cases as these would be an action of debt.⁵⁴ There may be statutes, however, which provide that these actions shall not survive; when this is the case, of course, there can be no recovery after the death of the person injured by the act of the company.

§ 635. Connecting line—liable.

As it has been seen at other places, it is the duty of the connecting line to receive all messages which may be tendered it by an initial line. The same care and diligence must be exercised by this line as is imposed on the first line, and any damages arising as a result of the company's failure to properly discharge these duties, will subject it to liability therefor. These statutes which place a penalty on telegraph companies for a failure to perform properly the duties which they owe to the public, apply to all telegraph companies doing a public business, and it matters not with whom they do business. As said, they may either transact business with respect to the transmission of news, either with a private person, or with another company. It is not only a privilege, but it is a duty for them to transact such business, where the messages are such as may be sent without subjecting them to an action. So, it has been held that these statutory penalties may be enforced against connecting telegraph lines where the initial company would be liable for the same act.⁵⁵ The claim by the connecting line that it acted merely as the agent for the first company, is no defense to an action to recover the penalty.⁵⁶ But in such cases, if the statute provides that the sender shall maintain the suit, it seems that the initial line must be the party to recover the penalty;⁵⁷ in other words, the original sender of the message cannot recover the penalty from the connecting line.⁵⁸ But if the statute provides that the penalty may be recovered either by the sender or

⁵⁴ 1 Chitt. Pl. 125; *Corporation v. Eaton*, 4 Cranch. C. C. 352; *United States v. Colt*, 1 Pet. C. C. 145; *Bogart v. City*, 1 Ind. 38.

⁵⁵ *United States Tel. Co. v. West. U. Tel. Co.*, 56 Barb. (N. Y.) 46; *People v. West. U. Tel. Co.*, 166 Ill. 15, 36 L. R. A. 637.

⁵⁶ *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619, 44 Am. St. Rep. 100, 19 S. E. 253.

⁵⁷ *United States Tel. Co. v. West. U. Tel. Co.*, 56 Barb. (N. Y.) 46.

⁵⁸ *Turn v. Alta Tel. Co.*, 15 Cal. 473.

the addressee, the latter may maintain a suit to recover same.⁵⁹ The various statutes enacted in the several states are so different in wording that each should be referred to in order that the proper construction may be placed on each.

§ 636. Defenses—office hours.

Telegraph companies may set up the same defenses in actions brought to recover the statutory penalty as are available in ordinary actions to recover damages resulting from their negligence.⁶⁰ It has been seen that they may regulate their office hours and provide that all messages shall be tendered for transmission within such hours, both at the receiving and terminal offices. As a result of such regulations, they are not liable to deliver the message immediately on its receipt if the terminal office should be closed; it would only be liable for such delay when the message was transmitted during the office hours of both the receiving and terminal offices. The same rule applies notwithstanding the fact that the action was brought to recover the statutory penalty. For the reason that one is maintainable under a common-law remedy and the other under a statutory remedy in which a penalty is imposed on the wrongdoer, does not change the rule that the same defense is available under each case. When the action is brought under the same statute, that is, one providing for a penalty when the message is not promptly transmitted, it may be shown that the delay was caused by a derangement of its lines due to an unavoidable casualty and that the message was sent within a reasonable time after the difficulty was removed.

§ 637. Same continued—free delivery limits.

Another regulation of telegraph companies is, that they will deliver all messages within a certain radius of the terminal office free of any extra charge. It is the duty, as has been said, for them to deliver all messages within a reasonable distance from their central offices, but they may prescribe the distance, provided it be reasonable.

⁵⁹ *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619, 19 S. E. 256, 44 Am. St. Rep. 100.

⁶⁰ *West. U. Tel. Co. v. Harding*, 103 Ind. 505; *Given v. West. U. Tel. Co.*, 24 Fed. 119.

This being a reasonable regulation for these companies to enforce, it does not become their duty to deliver a message beyond the free-delivery limit, unless it has become additionally compensated for such services. If they should fail to make such delivery, they would not be liable for any damages resulting from the failure to deliver same. There are some statutes which provide that, on failure to deliver a message, or where it has been unreasonably delayed in delivery, a penalty may be recovered. In an action to recover this penalty, the defense that the addressee resides beyond the free-delivery limit, may be set up as a good defense for not delivering the message.⁶¹

§ 638. Same continued—not under operation of statute—contributory negligence.

It is hardly necessary to enter into any lengthy discussion of the available defenses in actions brought to recover the statutory penalty imposed on these companies for failing to discharge their public duties, since the same defense may be used in these cases as may be set up in ordinary actions brought to recover damages for some negligent act, and which have been discussed heretofore. But having entered into the subject, we shall say a few things about each defense. As has been said, the cause of the action must be one covered by the statute; and should the action not be covered by such statute, or if the proof fails to sustain an action which is brought thereunder, this may be used as a defense in an action to recover the penalty. Penalties are not given as a matter of favor, and one who claims a penalty must bring himself fully and clearly within the law. The plaintiff in the case must not be guilty of any act which contributed directly to the cause of complaint, and if the company should show that he was guilty of contributory negligence, the penalty cannot be recovered. Thus, where the action is brought under a statute which provides for the recovery of a penalty in case a message is not promptly delivered, it may be shown as a defense that the plaintiff failed to give the proper address,⁶² or that he failed to give the Christian

⁶¹ West. U. Tel. Co. v. Lindley, 62 Ind. 371. See also Horn v. West. U. Tel. Co., 88 Ga. 538, 15 S. E. 16.

⁶² West. U. Tel. Co. v. Patrick, 92 Ga. 607, 90 Am. St. Rep. 90, 18 S. E. 980.

name, street, and number of the sendee in a city of 12,000 inhabitants.⁶³

§ 639. Same continued—harmless errors.

Where the error made in transmission is harmless and is due to mere inadvertence the penalty cannot be recovered.⁶⁴ Thus, under the Mississippi statute, the penalty is recoverable where there is a failure to "transmit correctly," yet it has been held that if there is no harm caused by the error, the penalty cannot be recovered. As was said by Judge Campbell, while rendering an opinion on this point: "Can it be supposed that for changing my signature or address from Campbell to Camel, or Campel or Cambelle, or Camwell, according to the form of writing it sometimes meets with, in a message sent by me or to me and promptly delivered, and accomplishing its purpose, and doing no harm, the penalty would be incurred? To so hold would impute to the legislature a spirit of injustice and cruelty that would seriously reflect on its attempt to legislate in this matter for the public interest. To limit the operation of the section as we do, is to secure all by it that will subserve the interest of the public, which is the object of the law."⁶⁵

§ 640. Same continued—Sunday dispatches.

It is held, in the Indiana and Missouri courts, that the penalty cannot be recovered by one who delivers his message for transmission on Sunday. In so holding, the court in one case, said: "A penalty cannot be recovered for failure to perform an illegal contract. The statute does not apply to contracts which are without legal force. The evident intention of the legislature was to secure the performance of such contracts as imposed binding obligations upon the telegraph companies. The statute is a highly penal one, and we cannot extend its operation by a liberal construction."⁶⁶ We certainly cannot

⁶³ West. U. Tel. Co. v. McDaniel, 1 West. Rep. (Ind.) 273.

⁶⁴ West. U. Tel. Co. v. Clark, 71 Miss. 157, 14 So. 452. See also West. U. Tel. Co. v. Rountree, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93; Wolf v.

West. U. Tel. Co., 94 Ga. 434, 21 S. E. 518.

⁶⁵ West. U. Tel. Co. v. Clark, 71 Miss. 157, 14 So. 452.

⁶⁶ West. U. Tel. Co. v. Axtell, 69 Ind. 191.

bring within its provisions a case, such as the present, where there is, in legal effect, no contract at all. Courts cannot declare, as a matter of law, that the business of telegraphing is a work of necessity. There are, doubtless, many cases in which the sending and delivery of a message would be a work of necessity within the meaning of our statute. But we cannot judicially say that all contracts for transmission of telegraphic messages are to be deemed within the statutory exception. Whether the contract is within the exception must be determined, as a question of fact, from the evidence in each particular case.”⁶⁷ A different ruling obtains in Mississippi, where it was held that the penalty could be recovered, although the message was delivered on Sunday for transmission, regardless of the fact of its being or not being about a matter of necessity, within the exception of the Sunday law.⁶⁸

§ 641. Stipulations—time for presenting claim—effect of.

Telegraph companies may adopt and enforce stipulations wherein it is provided that all claims must be presented within a certain time, otherwise the plaintiff will be barred from recovery. The reason for this rule has already been discussed. Where the language of these stipulations make them applicable to actions for penalties, it is as effective in such actions as for the recovery of damages,⁶⁹ and the same reasons why they should be enforced with respect to the recovery of damages are applicable for the recovery of the statutory penalty. It has been held, with few exceptions, that a stipulation requiring “all claims for damages” to be presented within a certain time embraces a claim for the penalty.⁷⁰ Judge Elliott, in an opinion on this point, said: “We think that in order to carry into effect the evident intention of the parties, and to give the clause the mean-

⁶⁷ *Id.*

⁶⁸ *McLaurin v. West. U. Tel. Co.*, 70 Miss. 26, 13 So. 36.

⁶⁹ *West. U. Tel. Co. v. Yopst*, 118 Ind. 248; *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713; *Albers v. West. U. Tel. Co.*, 98 Iowa 51, 66 N. W. 1040; *Montgomery v. West. U. Tel. Co.*, 56 Mo. App. 192; *Barrett v. West.*

U. Tel. Co., 42 Mo. App. 546; *Kirby v. West. U. Tel. Co.*, 7 S. Dak. 623; *West. U. Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828.

⁷⁰ *West. U. Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713. Compare *West. U. Tel. Co. v. Colbs*, 47 Ark. 344, 58 Am. Rep. 756. See also *West. U. Tel. Co. v. James*, 90 Ga. 254, 16 S. E. 83.

ing which the context shows it should have, it must be held that all claims which will confer a right to a recovery in money for a breach of contract or of duty, must be presented within sixty days. In a broad sense the word 'damages' means that which is assessed in the plaintiff's favor as the amount of his recovery, and that statutory penalty is in this sense 'damages.'⁷¹ The correctness of this holding has been denied in other cases.⁷² In Georgia, these stipulations are held void so far as they apply to the claim for the statutory penalty.⁷³ After giving considerable study to the subject, we have arrived at the conclusion that the proper view in which the matter should be considered is, that where these stipulations provide that all claims for damages shall be presented within a certain time, they embrace claims for statutory penalties as well as claims for actual damages sustained.

§ 642. Accord and satisfaction.

It is a general rule that where there is an agreement to satisfy all claims which may be pending and an execution of such agreement, this fact will bar all actions afterward brought to recover such claims, unless there was fraud of some kind perpetrated. The agreement must be made in good faith and cover all the claims demanded, and the same must be satisfied according to the agreement. As has been said, the penalty provided for in these statutes is not an award of liquidated damages, but is a punishment imposed on these companies for a violation of some of the duties which they owe to the public generally, and is recoverable only by the person against whom the duties are particularly violated. There can be an accord and satisfaction executed in such a manner as to bar the plaintiff from recovering the penalty. Thus, if the company should voluntarily tender or pay to the plaintiff the price paid for transmission and such damages as may have been sustained by the act of the company, and it also appears

⁷¹ West. U. Tel. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 713.

⁷² West. U. Tel. Co. v. Cobbs, 47 Ark. 344, 1 S. W. 558, 58 Am. Rep. 756. See also West. U. Tel. Co. v. James, 90 Ga. 254, 16 S. E. 83.

⁷³ Mattis v. West. U. Tel. Co., 94 Ga. 338, 21 S. E. 564, 1039, 47 Am. St. Rep. 167; Meadows v. West. U. Tel. Co., 96 Ga. 788, 22 S. E. 926.

that these payments were made in full settlement for all claims which he may have had against the company, he will be barred from afterward recovering the statutory penalty. But unless the fact appears that the voluntary payment of the damages which may have been sustained, and the price for transmission, were paid by way of accord and satisfaction, he will not be barred in afterward recovering the penalty.⁷⁴

§ 643. Prepayment of charges.

Some of the statutes which impose a penalty for the violation of these companies' duties, expressly state that the charges for transmission of the messages must be prepaid; when this is the case there can be no recovery of the penalty when it is shown that the charges have not been paid.⁷⁵ If the message was sent without charges because of the sender's connection with the company, or for other reasons, the penalty is not recoverable, although the message was marked "prepaid."⁷⁶ Where the sender tenders the amount of the charges and then withdraws them, observing that the addressee ought to pay the charges, the tender amounts to nothing and the penalty is not recoverable.⁷⁷ But if the message is paid for, the fact that the operator returns the money to the person paying and substitutes a free or a "collect" message for the prepaid one without the sender's knowledge, the company will be liable for the penalty.⁷⁸

§ 644. Repeal of statute—effect of.

The general rule is that the repeal of a statute prescribing a penalty in a civil action takes away the right of recovery,⁷⁹ whether an

⁷⁴ West. U. Tel. Co. v. Taylor, 84 Ga. 419, 8 L. R. A. 189; West. U. Tel. Co. v. Moss, 93 Ga. 494, 21 S. E. 63; West. U. Tel. Co. v. Brightwell, 94 Ga. 434, 21 S. E. 518; West. U. Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744.

⁷⁵ West. U. Tel. Co. v. Mossler, 95 Ind. 32; West. U. Tel. Co. v. Ferguson, 57 Ind. 495; Longby v. West. U. Tel. Co., 88 Ga. 777, 15 S. E. 291; Wood v. West. U. Tel. Co., 59 Mo. App. 236.

⁷⁶ This is under the Georgia statute: West. U. Tel. Co. v. Ryels, 94 Ga. 336, 21 S. E. 573.

⁷⁷ West. U. Tel. Co. v. Power, 93 Ga. 543, 21 S. E. 51.

⁷⁸ West. U. Tel. Co. v. Moss, 93 Ga. 494, 21 S. E. 63.

⁷⁹ Pope v. Lewis, 4 Ala. 487; Victory Webb Printing Co. v. Bucher, 26 Hun (N. Y.) 48; Wood v. Kennedy, 19 Ind. 68; Hunt v. Jennings, 5 Blackf. (Ind.)

action has been begun⁸⁰ or not;⁸¹ since there is no vested right in the penalty entitling its actual recovery by final judgment.⁸² The same rule applies to statutes which impose a penalty on telegraph companies for failing to perform the duties which they owe to the public:⁸³ but, in Indiana, the right to recover an accrued penalty for the delaying of a telegram is by special provision of the statute saved to the person injured by the delay, notwithstanding the repeal of the statute prescribing it.⁸⁴ In some cases, where the right to recover a penalty is destroyed by the repeal of the statute giving it, there may still be a recovery for the violation of the statute on common-law grounds. Thus, where a statute prohibits an act, and a violation of its provisions is such an act of negligence as, on common-law principles, subjects the offender to a civil action for damages on account of the loss or injury thereby caused, the repeal of the statute, while it destroys the right to recover the penalty, does not take away or impair a right of action which has already accrued by reason of such negligence.⁸⁵ Applying this rule to those statutes which we have been discussing, the repeal of the statute will not impair the right to recover the actual damages sustained by reason of the negligent act of the company.

195. 33 Am. Dec. 465; *Welsh v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239; *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Musgrove v. Vicksburg, etc., R. Co.*, 50 Miss. 677.

⁸⁰ *Bay City, etc., R. Co. v. Austin*, 21 Mich. 390; *Van Dyck v. McQuad*, 86 N. Y. 38; *Road v. Chicago, etc., R. Co.*, 43 Wis. 147.

⁸¹ *Comm. v. Standard Oil Co.*, 101 Pa. St. 119; *Smith v. Banker*, 3 How. Pr. (N. Y.) 141.

⁸² *Com. v. Welsh*, 2 Dana. (Ky.) 330; *Bank v. State*, 1 Sten. (Ala.) 347.

⁸³ *Hadley v. West. U. Tel. Co.*, 21 Am. & Eng. Corp. Cas. (Ind.) 72.

⁸⁴ *West. U. Tel. Co. v. Brown*, 14 Am. & Eng. Corp. Cas. (Ind.) 139.

⁸⁵ *Gray v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729; *German v. McArdle*, 67 Hun (N. Y.) 484; *Vanderkar v. Rensselaer, etc., R. Co.*, 13 Barb. (N. Y.) 393.

CHAPTER XXVII.

TAXATION.

§ 645. Introduction.

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§ 645. Introduction.

We propose to discuss, in this chapter, the right to tax telegraph and telephone companies; and, in treating the subject, we shall discuss the rights of the several states to make such imposition, then the rights as derived under the federal constitution. These rights might be more appropriately discussed under two separate chapters: but as the subject of taxation has been more thoroughly discussed in a general way by more able text-writers, we shall be brief in our treatment of the subject—applying the law thereunder, particularly to telegraph and telephone companies—and embrace the entire subject

under one chapter. Telegraph and telephone companies occupy the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods;¹ and while the nature of the business of these companies is quite different, yet the relation which each bears toward commerce is the same, and the law with respect to taxation is applicable to both. The cases against telegraph and telephone companies, with respect to taxation, are not so numerous as those which have been maintained against common carriers of goods; and for this reason, we shall, in many instances, refer the reader to such as may have been brought against the latter companies, where the same questions are involved.

§ 646. Power of state to tax.

It is a sovereign power of the state to tax property of every description belonging to telegraph and telephone companies, and over purely domestic or interstate telegraph and telephone companies the power of the state is supreme;² but over those engaged in interstate commerce, the power of the state is necessarily abridged by the commerce clause of the federal constitution. The property of these companies engaged in interstate commerce, which is not used in its business of conducting commerce between the states, is, of course, subject to taxation by the state to the same extent and in the same manner as the same property of natural persons or other corporations.³ For instance, if these companies are the owners of real property—such as houses and lots—which is not used in connection with their business as a carrier of interstate messages, this property is subject to state taxation to the same extent as if it belonged to an individual, and the power to tax is not affected by the clause in the federal constitution. So it is seen that the federal constitution exerts a very important influence upon the subject of taxation, and for this reason we shall at-

¹ *West. U. Tel. Co. v. Texas*, 105 U. S. 460; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1; *Postal Tel. Co. v. Richmond*, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 881.

² *West. U. Tel. Co. v. Massachusetts*, 145 U. S. 530, 12 S. Ct. Rep. 856;

West. U. Tel. Co. v. Texas, 105 U. S. 460; *Postal Tel. Cable Co. v. Adams*, 71 Miss. 555, 42 Am. St. Rep. 483, 14 So. 36.

³ *Leloup v. Port of Mobile*, 127 U. S. 640, 8 S. Ct. Rep. 1380.

tempt to discuss the subject separately, and take up, first, the power of the state to tax.

§ 647. How assessments may be made.

The legislature of the state, except where it is limited by the constitution, is invested with the supreme power over the subject of taxation. The taxes are levied by the legislature, and the mode of assessing property must be prescribed by statute.⁴ The best method of taxing the property of telegraph and telephone companies, where it forms a part of its lines, is to regard it as a unit and assess the property as an entity, since any other method would divide or cut up the property into fragmentary parts and lead to confusion and injustice. Some of the courts have held that this is the only method which can be exercised by the legislature;⁵ but it seems that where the legislature is not restricted by constitutional provisions, it ought to be the sole judge of the method which should be pursued in such matters.⁶

§ 648. Methods of taxation.

The four principal methods of taxation are: (1) on the capital stock; (2) on the corporate property; (3) on the franchise; (4) on the business done by the corporation.⁷ As was said, the legislature has the power to levy taxes and prescribe the method by which the

⁴ Wisconsin Cent. R. v. Taylor Co., 52 Wis. 37, 8 N. W. 883; State v. Central etc., Co., 21 Nev. 260, 30 Pac. 689; North Missouri, etc., Co. v. Maguire, 102 U. S. 472; Cooley Court. Lim. (5 Ed.) 637; Meriwether v. Garrett, 102 U. S. 472.

⁵ Applegate v. Ernst, 3 Bush 648, 96 Am. Dec. 272. See, also, Graham v. Mt. Sterling Coal Co., 14 Bush 425; Franklin Co. v. Nashville, etc., Co., 12 Lea 521.

⁶ Wilson v. Weber, 96 Ill. 454; State v. I. C. R. Co., 27 Ill. 64, 79 Am. Dec. 396; Sangamore, etc., Co. v. Morgan, 14 Ill. 163, 56 Am. Dec. 497.

⁷ Worth v. Wilmington, etc., Co., 89 N. C. 291, 45 Am. Rep. 679; City of New Orleans v. Kaufman, 29 La. Ann. 283, 29 Am. Rep. 328; Pittsburg, etc., R. Co. v. State, 49 Ohio St. 189, 16 L. R. A. 380, 30 N. E. 435; West. U. Tel. Co. v. Massachusetts, 125 U. S. 530, 8 S. Ct. Rep. 961, 33 Fed. 129; Union Pac. R. Co. v. Peniston, 18 Wall (U. S.) 5; Thompson v. Pac. R. Co., 9 Wall. (U. S.) 579; West. U. Tel. Co. v. Lieb, 76 Ill. 172. See also Postal Tel. Cable Co. v. Barwood, 37 Ill. App. 105.

assessments shall be made. This power is supreme so far as the property subject to taxation is exclusively within the control of the jurisdiction of the states; and where a method is prescribed by statute for the assessment of the taxes, none other can be pursued.⁸ While the courts may declare a statute invalid where it conflicts with the constitution, they cannot supervise or control legislative discretion, nor can they dictate the policy to be pursued.⁹

§ 649. Classification—discretion of legislature.

The discretionary powers of the legislature are very broad and comprehensive, and no matter how unjustly they may be exercised, the courts cannot, so long as the constitutional powers are not transcended, interfere with them. The question always is as to whether it has these powers; and if it be clear that the same may be exercised, the courts cannot alter, amend or annul the statute; otherwise they may. Different methods may be prescribed, under the legislative discretionary powers, for assessing corporations of different classes, and a statute which provides different methods for this purpose, cannot be successfully assailed upon the ground that it provides a method for assessing telegraph and telephone companies different from that for assessing other corporations.¹⁰ Classification of different corporations may be made, and if these companies are put in a separate and distinct class from others, a method of assessing them may be prescribed different from that prescribed in the assessment of other corporations of a different class. But if the constitution provides that taxes shall be equal and uniform, the mode of assessing these companies must be uniform; that is, one company of the same class and character cannot be assessed differently from another of precisely the same class and character.¹¹

⁸ Louisville, etc., Co. v. Warren County, 5 Bush 243.

⁹ Legal Tender Cases, 12 Wall 457; State v. Hayworth, 122 Ind. 462, 7 L. R. A. 240, 23 N. E. 946; City of Dubuque v. Chicago, etc., Co., 47 Iowa 196.

¹⁰ St. Louis, etc., Co. v. Worthey, 52 Ark. 529, 13 S. W. 254, 7 L. R. A.

374; Kentucky Railroad Tax Cas. 92 U. S. 663; Missouri, etc., Co. v. Mackey, 127 U. S. 205, 8 S. Ct. Rep. 1161; West. U. Tel. Co. v. Poe, 64 Fed. 9, overruling West. U. Tel. Co. v. Poe, 61 Fed. 449.

¹¹ Worth v. Whittington, etc., Co., 89 N. C. 291, 45 Am. Rep. 679; New Orleans v. Kaufman, 29 La. Ann. 283,

§ 650. The same must be paid when properly assessed.

The taxes may be laid upon these corporations directly, and when this is the case, it is upon the legal entity and must be paid out of the revenues of said corporations; or it may be laid on the shares of stock in the hands of the shareholders and not on the corporations strictly speaking. However, when laid on either, it must be paid, provided it is authorized and enforceable.¹² But if the taxes are laid on the corporation and not on the shares, a failure of payment will be a breach of duty of the corporation,¹³ and, vice versa, if laid on the shares a failure to pay same will be a breach of duty of the shareholders. The reason why this difference should be considered is, that there are statutes generally enacted providing for a penalty to be imposed upon the one guilty of a culpable breach of this duty, and unless it is known upon whom the taxes are laid, it could not be ascertained as to who should suffer the penalty.

§ 651. Discrimination.

Where the state constitution provides that taxes shall be equal and uniform, no material and unjust discrimination can be made against the property of telegraph and telephone companies;¹⁴ independent of any federal rule or regulation. These requirements are violated by imposing a heavier burden upon these companies than that imposed upon the property of railroad companies or other corporations, or that on the property of natural persons. The word "person" in our constitution, comprehends corporations; and when it provides that the property of all persons shall be equal and uniform, it is meant by this that the property of corporations must be taxed equally and uniformly, not only with respect to that belonging to other corporations of the same or different class, but also with respect to that belonging to private persons. The burden, as we understand it, must

29 Am. Rep. 328; *Pittsburg, etc., R. Co. v. State*, 49 Ohio St. 189, 30 N. E. 435, 16 L. R. A. 380.

¹² *Bailey v. Atlantic, etc., Co.*, 3 Dill. 22; *Barnsley v. St. Louis, etc., R. Co.*, 3 Dill. 13; *Greenwood v. Freight Co.*, 105 U. S. 13; *Louisville v. Louisville,*

etc., 90 Ky. 409, 14 S. W. 408, 9 L. R. A. 629n.

¹³ *Whittaker v. Brooks*, 90 Ky. 68, 13 S. W. 355; *Gallispie v. Gaston*, 67 Tex. 599, 4 S. W. 248.

¹⁴ *Chicago, etc., Co. v. Board*, 54 Kan. 781, 39 Pac. 1039.

be palpably and materially greater than that imposed on other property, since in all systems of taxation there is some inequality.¹⁵

§ 652. Lien of assessment.

The statutes which provide the method of assessing property generally provide that the property shall be subject to a lien thereon for its taxes. The tax lien owes its existence wholly to the statute, and is not created by implication. The extent, duration and the property subject to such lien must be determined by the statute creating it.¹⁶ These statutes generally provide that the lien for taxes shall have a priority over all other claims against the property. As it has been said, the property of telegraph and telephone companies may be assessed as a unit. When this method is prescribed by statute, the conclusion is that the lien for taxes assessed attaches to the entire property.¹⁷ This fact, however, may be controlled by statutory provisions, but if there is no other method prescribed by the statute, the entire property will be subject to the lien for taxes. It must be understood, however, that only such property of the company as is within the jurisdiction of the state is subject to such lien, since the provisions of any statute can have no effect beyond the boundaries of the state creating it.

§ 653. Interstate commerce—obstruction of.

A state unquestionably has the right to tax all property over which it has jurisdiction and which is not used in interstate commerce, but when it attempts to tax that property used exclusively in carrying on commerce between the states, an infringement of the commerce clause of the federal constitution is then made. While this is the rule, yet it is very difficult in applying it to every particular case. The powers of the state to tax property cannot be exercised so as to ob-

¹⁵ *Cumberland Marine, etc., Co. v. Portland*, 37 Me. 444; *New York, etc., R. Co. v. Sabin*, 26 Pa. St. 242; *Osborn v. New York, etc.*, 40 Conn. 491; *Hannibal, etc., Co. v. Shocklett*, 30 Mo. 550.

¹⁶ *Maricopa, etc., R. Co. v. Arizona*, 156 U. S. 347, 15 Sup. Ct. R. 391.

¹⁷ *Bailey v. Feequa*, 24 Miss. 497; *Anderson v. State*, 23 Miss. 459; *Par-ker v. Smith*, 10 S. Car. 226; *Tompkins v. Little Rock, etc., R. Co.*, 18 Fed. 344; *Garrettson v. Scofield*, 44 Iowa 37.

struct commerce between the states, or to defeat or restrain the power of the federal Congress to regulate commerce.¹⁸ The power, as may have been seen, to tax property used in interstate commerce is within

¹⁸ In the case of *Brown v. Maryland*, 12 Wheat. 419, Chief Justice Marshall, speaking of the taxing power, said: "We admit this power to be sacred, but cannot admit that it may be so used as to obstruct the free exercise of power given Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the power remaining with the states may be exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as vital principles of perpetual operation. It results, necessarily, from this principle, that the taxing power of the state must have some limits." In the *State Freight Tax Case*, 15 Wall. 232, Justice Wayne expressed the same general doctrine in this language: "While on the other hand it is of the utmost importance that the states should possess the power to raise revenue for all the purposes of a state government, by any means and in the manner not inconsistent with the powers which the people of the state have conferred upon the general government, it is equally important that the domain of the latter should be preserved from invasion and that the state legislation should be sustained which defeats the avowed purpose of the federal constitution, or which assumes to regulate or control subjects committed by the constitution exclu-

sively to the regulation of Congress." See also *Osborn v. State*, 33 Fla. 162, 25 L. R. A. 120, 30 Am. St. Rep. 99, 14 So. 588. The fact that a telephone company has extended its line through different states and is engaged in interstate commerce, will not relieve it from the operation of state statute, upon business conducted wholly within that state, nor justify its refusal of a telephone and the best telephonic connections and facilities to persons doing business in such state, on the terms prescribed by such statute: *Central U. Tel. Co. v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114. Messages sent over such telephones are commerce between the states, and cannot be prohibited by injunction in either state against persons or corporations engaged in sending such messages because they do not pay the taxes assessed against them by such state: *In re Pennsylvania Telephone Company*, 48 N. J. Eq. 91, 27 Am. St. Rep. 462, 20 Atl. 846.

A state statute making it the duty of every telegraph and telephone company to deliver with promptness every message received to the person to whom it is addressed, if the regulation of the company require such delivery, or to forward it promptly as directed, and providing a penalty for every failure to deliver or forward such message as promptly as practicable, such penalty to be paid to the person sending the message, or to whom it is addressed, as imposing a burden upon, or as a regulation of, interstate commerce, when applied to the failure of an interstate telegraph company to deliver a message in that state sent from an-

the exclusive control of Congress, and if there is a state tax which so operates as to regulate or, control commerce between the states there is an invasion of the domain of the federal government.¹⁹ So, it follows that if a state tax operates so as to obstruct such commerce,

other state and delivered in the former state: *West. U. Tel. Co. v. Tyler*, 90 Va. 297, 18 S. E. 280, 44 Am. St. Rep. 910; *Gray v. Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706. But see *Marshall v. West. U. Tel. Co.*, 79 Miss. 154, 27 So. 614, 89 Am. St. Rep. 585. They may enact laws subjecting telegraph companies to penalties for acts of negligence occurring entirely within the limits of that state, although such acts may be committed in dealing with messages to be transmitted to points in other states: *West. U. Tel. Co. v. Howell*, 95 Ga. 194, 51 Am. St. Rep. 68, 22 S. E. 286.

A statute prohibiting all persons from engaging in the business of transmitting money to any racetrack or other place, to be there bet on any horse-race trial of speed, skill, or endurance, etc., whether within or without the state, and also from keeping any place in which such business is permitted or carried on, is valid and not unconstitutional as a regulation of interstate commerce as applied to the agent of the telegraph company who is engaged in such business, and transmits money to another state by telegraph to be there bet upon the result of horse-races: *State v. Harbourna*, 70 Conn. 484, 40 Atl. 179, 66 Am. St. Rep. 126; *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795, 24 S. E. 930. And statutes providing the time in which suits are to be brought against telegraph companies for losses occurring in failing to transmit or deliver messages promptly are not unconstitutional when applied to interstate commerce. *Burgess v. West. U. Tel. Co.*,

92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833.

¹⁹ *San Francisco v. West. U. Tel. Co.*, 39 Am. & Eng. Corp. Cas. (Colo.) 601; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. 1; *West. U. Tel. Co. v. Texas*, 105 U. S. 460.

A revenue law providing that, at a certain time in each year, the managing officer of "any telegraph company, working, operating or controlling any telegraph line in this state," shall "pay to the treasurer a tax equal to one dollar per mile for the line of poles and first wire, and fifty cents per mile for each additional wire" imposed a tax on the business, not on the property, of the companies affected, and those companies are agencies of interstate commerce, the law is invalid as being an attempted exercise of a power belonging exclusively to the federal legislature: *Com. v. Smith*, 92 Ky. 38, 17 S. W. 187, 36 Am. St. Rep. 578. But a state tax imposed upon telegraph companies operating within the state, in lieu of all other taxes, as a privilege tax, its amount being graduated according to the amount and value of the property measured by miles, if reasonable in amount, and especially if less than the ad valorem state tax is valid and not an interference with interstate commerce when imposed upon a foreign telegraph company operating its lines in and across the state, although such company is engaged in sending interstate messages: *Postal Tel., etc., Co. v. Adams*, 71 Miss. 555, 14 So. 36, 42 Am. St. Rep. 476; *Postal Tel. Co. v. Richmond*, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877.

the statute imposing such tax is invalid, since no state can obstruct or hinder interstate commerce. The general principle in regard to this subject is easily understood, but it is very difficult to apply it to the different cases, and it is well to say that each case must be considered in its own light in order to ascertain as to whether the principles are applicable thereto.

§ 654. Property of telegraph and telephone companies used in interstate commerce—subject to state taxes.

When property is used in interstate commerce, this fact does not exonerate it from state taxes.²⁰ The property, having its situs within the state imposing the taxes, may be taxed by the state although it is used exclusively for interstate commerce, but the business of interstate commerce itself cannot be burdened with such taxes.²¹ "Its

²⁰ West. U. Tel. Co. v. Texas, 105 U. S. 460; West. U. Tel. Co. v. Atty.-Gen., 125 U. S. 530, 8 Sup. Ct. R. 961; Le-loup v. Mobile, 127 U. S. 640, 8 Sup. Ct. R. 1380; Postal Tel. Cable Co. v. Adams, 71 Miss. 555, 42 Am. St. Rep. 476, 14 So. 36.

In West. U. Tel. Co. v. Massachusetts, 145 U. S. 530, the court, said: "While the state could not interfere by any specific statute to a corporation from placing its lines along their post roads or stop the use of them after they were placed there, nevertheless the company receiving the benefits of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real and personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of another state, and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair pro-

portion of the taxes necessary to its support."

In another case the court, said: "The Western Union Telegraph Company, having accepted restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and business." West. U. Tel. Co. v. Texas, 105 U. S. 460. See also West. U. Tel. Co. v. Massachusetts, 127 U. S. 530, 8 S. Ct. Rep. 1297.

²¹ Pullman Palace Car. Co. v. Pennsylvania, 141 U. S. 18, 11 S. Ct. Rep. 876; Dubuque v. I. C. R. Co., 39 Iowa 56; West. U. Tel. Co. v. Taggart, 141 Ind. 281, 40 N. E. 1051, 60 L. R. A. 671n; Osborne v. State, 33 Fla. 162, 14 So. 588, 25 L. R. A. 120, 39 Am. St. Rep. 99; Postal Tel. Cable Co. v. Richmond, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877.

property in the state is subject to taxation the same as other property: and it may undoubtedly be taxed in a proper way on account of its occupation and its business.”²² The exemption of interstate and foreign commerce from state regulation does not prevent the state from taxing the property of those engaged in such commerce located within the state, as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce.²³ Thus, a statute is held valid which authorizes the taxation by several towns of the state, of the portions of telegraph lines in such towns, including the interest on the value of land occupied by the line, all poles, insulators, wires and apparatus, although such lines may run into other states.²⁴ And the fact that the company has paid a privilege tax, does not release it from liability for taxes assessed on its property, such as its poles, wires and other instruments.²⁵

§ 655. Taxation on capital stock in proportion to length of line in state.

It has been held by courts of last resort that the taxing officers may take into consideration the lines of wires extending into and through other states, in determining the value of the entire line.²⁶ A Massachusetts statute,²⁷ provided that every telegraph company owning a line in the state should be taxed on such proportion of the whole value of its capital stock as the length of its line in the state bears to the whole length of its line everywhere, after deducting the value of any property owned by it subject to local taxation in the cities and towns

²² *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 350, 33 Fed. 129, 141 U. S. 40, 11 S. Ct. Rep. 889; *Taylor v. Secor*, 92 U. S. 575; *West. U. Tel. Co. v. State*, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 99; *Postal Tel. Cable Co. v. Adams*, 71 Miss. 555, 14 So. 36, 42 Am. St. Rep. 476.

²³ *Leloup v. Mobile*, 127 U. S. 640, 8 S. Ct. Rep. 1380, affirming *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 S. Ct. Rep. 961.

²⁴ *People v. Tierney*, 57 Hun (N. Y.)

357; *People v. Dolan*, 126 N. Y. 166, 12 L. R. A. 251.

²⁵ *West. U. Tel. Co. v. State*, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 99.

²⁶ *West. U. Tel. Co. v. Attorney-General*, 125 U. S. 530, 8 Sup. Ct. R. 961; *Pittsburg, etc., Co. v. Backers*, 154 U. S. 421, 14 Sup. Ct. R. 1114; *Columbus, etc., R. Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. R. 396; *West. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. R. 961.

²⁷ Chapter 13, § 35.

of the state. It was held, that such tax was not in violation of the interstate commerce clause of the constitution. In rendering an opinion on this statute, the court said: "The statute . . . intended to govern the taxation of all corporations doing business within its territory, whether organized under its own laws or under those of some other state; and the rule adopted to ascertain the amount of the capital engaged in that business within its boundaries on which the tax should be assessed, is not an unfair or unjust one, and the details of the method by which this was determined have not exceeded the fair range of legislative discretion."²⁸

§ 656. Mileage basis of valuation.

It has also been decided that the taxing officers may make a valuation upon the mileage basis, although the property may be used for interstate commerce. Thus, a state privilege tax of a certain amount per mile of wires operating within the state, imposed on all telegraph companies therein operating, in lieu of all other state, county and municipal taxes, and amounting to less than the ordinary ad valorem tax, is substantially a mere tax on property, to which a foreign corporation operating within the state is subject, notwithstanding it is engaged in interstate commerce.²⁹ But a general tax, imposed upon a telegraph company, affects its entire business, interstate as well as domestic or internal, and is unconstitutional. So, there is a distinction between such cases when the taxes are imposed upon the business of interstate commerce itself and those which may be laid upon the property within the state employed in such business.³⁰

§ 657. Assessment of telegraph lines for taxation—New York state.

A statute³¹ in New York provides that telegraph lines shall be assessed "in the manner provided by law for the assessment of lands."

²⁸ West. U. Tel. Co. v. Massachusetts, 141 U. S. 40, 11 S. Ct. Rep. 889.

²⁹ West. U. Tel. Co. v. Massachusetts, 125 U. S. 530, 8 Sup. Ct. R. 961; Pullman, etc., Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. R. 876; Maine v.

Grand Trunk, etc., Co., 142 U. S. 217, 12 Sup. Ct. R. 121.

³⁰ Leloup v. Port of Mobile, 127 U. S. 640, 8 S. Ct. Rep. 1380.

³¹ Laws 1886, ch. 659.

and that the word "line" shall include "the interest in the land on which the poles stand, the right or license to erect such poles on land, and all poles, arms, insulators, wires, apparatus, instruments, or other things connected with or used as a part of such line." It is held that, in making the assessment, the property is not to be regarded as a whole, nor as a complete telegraph line in operation, but that the true value is obtained by taking the cost of production of poles, wires and other apparatus, which are in their nature personalty, and adding thereto the value of the company's interest in the land on which the poles stand, and the right to erect the poles thereon.³² In the same case it is held that in arriving at the value of the interest in the land on which the poles stand and of the right to erect such poles, it is to be considered that so far as the line is erected upon the highway, the only interest that the company has is a mere license, revocable at the will of the legislature, of which license any other company may avail itself. The expense which the company incurred in obtaining the interest is the correct criterion by which to judge of its value.³³

§ 658. License tax—cannot be imposed.

A license tax is a tax imposed as a condition of permitting business to be conducted within the state imposing such tax, and is therefore a tax upon interstate commerce, and for this reason is invalid. Thus, where a telegraph company is carrying on the business of transmitting messages between the different states, and has accepted and is acting under the telegraph laws passed by Congress,³⁴ no state, within which it sees fit to establish an office, can impose upon it a license tax, or require it to take out a license for the transaction of such business.³⁵ Such tax is not a tax upon the property of these

³² *People v. Dolan*, 126 N. Y. 166, 12 L. R. A. 251.

³³ *Id.*

³⁴ July 24, 1866.

³⁵ *Leloup v. Mobile*, 127 U. S. 640, 8 S. Ct. Rep. 1380. The Western Union Telegraph Company established an office in the city of Mobile and was required to pay a license tax under a city ordinance imposing an annual tax

of two hundred and twenty-five dollars on every telegraph company in the city. The agent of the company was fined for non-payment of the tax. In an action to recover the amount of the fine, it was held, reversing the decision of the state supreme court, that such tax affected the entire business of the company interstate as well as domestic and was constitutional. The state court

companies, nor is it the exaction of a fee for the privilege of becoming a corporation. If, however, the license tax is only imposed on "each and every person or company engaging in the business of sending and receiving telegraphic messages to and from points within the state . . . and keeping an office or place of business" therein,

relied mainly on the case of *Osborne v. Mobile*, 16 Wall. (U. S.) 479, which held that an ordinance of the city of Mobile was not unconstitutional, which required every express company or railroad company doing business there, and having a business extending beyond the limits of the state, to pay an annual tax of five hundred dollars; if the business was confined within the limits of the state, a tax of one hundred dollars; if confined within the city, of fifty dollars. The decision of the state court, however, was reversed.

A license tax imposed by a city upon telegraph companies in the following terms: "Telegraph companies each, for business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents, \$500," is not invalid as applied to a company partly engaged in transmitting interstate messages, and which has accepted the provisions of the Act of July 24, 1866, and thereby become an agency of the United States, 56 Fed. 419; affirming *Postal Tel. Cable Co. v. City Council of Charleston*, 153 U. S. 692, 14 Sup. Ct. R. 1049. A contention that a telegraph company seeking to enjoin collection of the tax is not within the scope of the ordinance because it in fact does no business "exclusively within the city," and that its city offices are merely initial points for sending messages to points outside the city, cannot be considered, for if the state has power to tax business

done within the limit, the exercise of that power cannot be corrected by the federal court.

A similar tax was sustained in *West. Union Telegraph Company (Neb.)*, 58 N. W. 415. The ordinance levying the tax was as follows: "Section 1. That there is hereby levied a license tax on each and every occupation and business within the limits of this city, in this section hereinafter enumerated, to raise a revenue thereby in the several different sums of the several different businesses and occupations, respectively, as follows: No. 1. The sum of one hundred dollars per year on the business and occupation of receiving messages in this city from persons in this city and transmitting the same by telegraph from this city within this state to persons and places within this state, and receiving in this city messages by telegraph transmitted within this state from persons and places in this state to persons within this city and delivering the same to persons in this city, excepting the receipt, transmission and delivery of any such message to and from any department, agency, or agent of the United States and excepting the receipt, transmission and delivery of any such message are inter-state commerce: the business and occupation of receiving, transmitting and delivering of the messages herein excepted is not taxed hereby." The court held the following propositions: 1. State and municipal authorities are powerless to impose a tax upon messages to or from other states, since

the rule would be otherwise.³⁶ In this case, the license tax may be enforced without interfering with interstate commerce or the rights of the general government secured to it under the act of Congress.³⁷ So, it has been held that an annual charge of five dollars per pole upon the poles of a telegraph company already established, under an express provision by ordinance imposed by a municipality as a "consideration for the privilege," is not a tax, either on property or as a license; nor is it an exercise of the police power, as it involves no consideration of public order, health, morals, or convenience, and can not therefore be sustained,³⁸ although it may be enforced if the ordinance imposing it is a police regulation.³⁹

§ 659. Distinction between property tax and privilege tax.

As it has been seen, a state may impose a tax upon property within the state, although it may be used for interstate commerce, but a privilege tax, as said, is not a property tax. Whether the tax is laid upon property or imposed as a condition or privilege of conducting business within the state, is a question to be determined from the operation and practical effect of the statute and not from its mere

such a tax would be in conflict with that clause of the Federal Constitution which gives to Congress the exclusive power to regulate commerce among the several states. 2. Where a telegraph company is engaged in both interstate and intrastate business, an ordinance levying an occupation tax on that portion of such business which is carried on wholly within the state is not repugnant to section 8, article —, of the Constitution of the United States since it in no way interferes with, or regulates, interstate commerce.

³⁶ *Leloup v. Mobile*, 127 U. S. 640, 8 S. Ct. Rep. 1380; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. R. 1049; *West. U. Tel. Co. v. Fremont (Neb.)*, 58 N. W. 415.

³⁷ *Leloup v. Mobile*, 127 U. S. 640, 8 S. Ct. Rep. 1380.

³⁸ *New Orleans v. Great South. Tel.*,

etc., 52 La. Ann. 1082, 78 Am. St. Rep. 387, 27 So. 590.

³⁹ *West. U. Tel. Co. v. Philadelphia*, 21 Am. & Eng. Corp. Cas. (Pa.) 40.

The power of a municipality to charge license fees to railway companies, telegraph and telephone companies, and other public institutions, cannot be questioned, so long as such license is a police regulation, and tends to accomplish the object sought. See, on this subject, *Mayor of Mobile v. Yuille*, 3 Ala. 137; *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221; *State v. Herod*, 29 Iowa 123; *Boston v. Schaffer*, 26 Mass. (9 Pick.) 415; *Van Bachen v. People*, 40 Mich. 258; *State v. Cassidy*, 22 Minn. 312; *New York City v. Second Ave. R. Co.*, 32 N. Y. 261; *May v. Cincinnati*, 1 Ohio St. 268; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

form.⁴⁰ The distinction between a privilege tax and property tax is a subtle one, and it is not by any means easy to draw the line which separates them.⁴¹

⁴⁰ *New Orleans v. Great South Tel., etc., Co.*, 52 La. Ann. 1082, 27 So. 590, 78 Am. St. Rep. 387.

The nature and object of a license and a tax are entirely different; the object of a tax is the revenue, the object of a license is a regulation; and the fact that the license fee is payable into the treasury of the municipality does not make such license a tax where the fee is unreasonable, and tends to promote the object of the ordinance: *East St. Louis v. Wehering*, 46 Ill. 392; *State v. Herod*, 29 Iowa 123. If the license is unreasonable, and more than sufficient to effect the ostensive regulative purposes, it will be a tax and not a license: *New Orleans v. Great South Tel., etc., Co.*, 52 La. Ann. 1082, 27 So. 590, 78 Am. St. Rep. 387.

⁴¹ The question received consideration in the case of the *Postal, etc., v. Adams*, 155 U. S. 688, 15 Sup. Ct. Rep. 268, where it was held that a tax of a designated sum per mile of telegraph wire in the state was a tax on property and not a mere privilege tax. The court used this language: "As pointed out by Mr. Justice Field in *Horns Silver Min. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. Rep. 403, the right of the state to tax the franchise or privilege of being a corporation as personal property has been repeatedly recognized by this court, and this, whether the corporation be domestic or a foreign corporation, doing business by permission within the state. But a state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the

general government, either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the state may subject it to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens. *Ashley v. Ryan*, 153 U. S. 436, 14 Sup. Ct. Rep. 865, and cases cited.

Doubtless no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax or the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution. *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439, 14 Sup. Ct. Rep. 1122. The method of 'taxation by a tax on privileges' has been determined by the Supreme Court of Mississippi to be in harmony with the constitution of that state, and that 'where the particular arrangement of taxation, provided by legislative wisdom, may be accounted for on the assumption of compromising or commuting for a just equivalent, according to the determination of the legislature, in the general scheme of taxation, it will not be condemned by the courts as violative of

§ 660. Excise tax.

It has been held by a divided opinion of the United States Supreme Court, that an excise tax could be imposed upon a railroad company carrying on interstate commerce. In this decision, the cases denying the power of a state to levy a privilege tax are not denied expressly, but it is held therein that a state is not precluded from levying an excise tax.⁴² No case against a telegraph company,

the state constitution.' *Vicksburg Bank v. Worrell*, 67 Miss. 47, 7 So. 219. In that case privilege taxes imposed on bank of deposit or discount, which varied with the amount of capital stock or assets, and were declared to be in lieu of all other taxes, state, county or municipal, upon the shares and assets of said bank, came under review, and it was decided that the privilege tax, to be effectual as a release from liability for all other taxes, must be measured by the capital stock, and the entire assets or wealth of the bank, and that real estate bought with funds of the bank was exempt from the ordinary *ad valorem* taxes, but was part of the assets of the bank to be considered in fixing the basis of its privilege tax."

⁴² In the case of *Maine v. Grand Trunk, etc., Co.*, 142 U. S. 217, 12 Sup. Ct. Rep. 163, the court, said: "The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the state of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the state to levy there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal

in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a state is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the state whether the corporation be domestic or of foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state, in its judgment, may deem most conducive to its interest or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period, or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the state in determining in what may be justly exacted for the privilege. The rule of apportioning the charge of the receipts of the business would seem to be eminently rea-

to our knowledge, has been tested with respect to this question, but we presume the same ruling would be held. The distinction drawn between the excise tax as given in the case cited and the privilege tax is not very clear, and it seems that the reasons given by the minority of judges who sat upon this case are the more plausible.⁴³

sonable, and likely to produce the most satisfactory results, both to the state and the corporation taxed."

⁴³Mr. Justice Bratley, who wrote the minority opinion (concurring in by Harland, Lamar and Brown, JJ.), said: "But passing this by, the decisions of this court for a number of years past have settled the principle that taxation (which is a mode of regulation) of interstate commerce, or of the revenues derived therefrom (which is the same thing), is contrary to the constitution. Going no further back than *Pickard v. Pullman*, etc., Car Co., 117 U. S. 34, 6 Sup. Ct. Rep. 635, we find that principle laid down. There a privilege tax was imposed upon Pullman's Palace Car Co., by general legislation, it is true, but applied to the company, of \$50 per annum on every sleeping car going through the state. It was known, and appears by the record, that every sleeping car going through the state carried passengers from Ohio and other northern states to Alabama, and *vice versa*, and we held that Tennessee had no right to tax those cars. It was the same thing as if they had taxed the amount derived from the passengers in the cars. So, also, in the case of *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, we held that the receipts derived by the telegraph company from the messages sent to one state from another could not be taxed. So in the case of *Norfolk*, etc., R. Co. v. *Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. Rep. 958, where the railroad was a link in a through line by

which passengers and freight were carried into other states, the company was held to be engaged in the business of interstate commerce, and could not be taxed for the privilege of keeping an office in the state. And in the case of *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851, we held that the taxation of an express company for doing an express business between different states was unconstitutional and void. And in the case of *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118, we held that a tax upon the gross receipts of the company was void, because they were derived from interstate and foreign commerce. A great many other cases might be referred to showing that in the decisions and opinions of this court this kind of taxation is unconstitutional and void. We think that the present decision is a departure from the line of these decisions. The tax, it is true, is called a 'tax on franchise.' It is so called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation. This court and some of the state courts have gone a great length in sustaining various forms of taxes upon corporations.

The train of reasoning upon which it is founded may be questionable. A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter, for its franchises, for the privilege of carrying on its business; it may be taxed on its capital, and it may be

§ 661. Taxation on gross receipts—interstate business.

It is a general rule, upheld by all the courts, that a tax cannot be imposed on the business of interstate commerce,⁴⁴ but it is sometimes difficult to give practical effect to the general rule. A tax cannot be laid on the gross receipts of an interstate company, as this is a tax upon the business of interstate commerce.⁴⁵ But it has been held that a single tax assessed under the statute of a state upon the receipts of a telegraph company, which are derived partly from interstate commerce and partly from commerce within the state, which tax is assessed and returned in gross and without separation and apportionment, is not wholly invalid, but is invalid only to the extent that such receipts are derived from interstate commerce.⁴⁶

§ 662. Same on message.

A tax imposed by a state on telegraph messages in general is invalid, except in respect to messages transmitted wholly within the state.⁴⁷ A different rule was held by some of the state courts, but the ruling of the Supreme Court of the United States is as first

taxed on its property. Each of these taxations may be carried to the full amount of the property of the company."

⁴⁴ *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380; *West. U. Tel. Co. v. Ratterman*, 127 U. S. 411; *West. U. Tel. Co. v. Texas*, 105 U. S. (15 Otto.) 460, 26 L. Ed. 1067; *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. (6 Otto.) 1, 24 L. Ed. 708; *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 6 L. Ed. 23; *Smith v. Turner*, 48 U. S. (7 How.) 283, 12 L. Ed. 702; *Thurlo v. Massachusetts*, 46 U. S. (5 How.) 504, 12 L. Ed. 256; *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419, 6 L. Ed. 678; *Moran v. New Orleans*, 112 U. S. (12 Otto.) 69, 28 L. Ed. 653; *Philadelphia, etc., R. Co. v. Pennsylvania*, 82 U. S. (15 Wall.) 232, 21 L. Ed. 146.

⁴⁵ *Tel. Co. v. Texas*, 105 U. S. 460; *Philadelphia, etc., Co. v. Pennsylvania*, 122 U. S. 326; *Ratterman v. West. U. Tel. Co.*, 127 U. S. 411; *Gloucester Ferry Co. v. Pennsylvania Co.*, 114 U. S. 196; *McCall v. California*, 136 U. S. 104; *West. U. Tel. Co. v. Pennsylvania*, 128 U. S. 39; *West. U. Tel. Co. v. Seay*, 132 U. S. 472; *Leloup v. Port of Mobile*, 127 U. S. 640; *Charleston v. Postal Tel. Cable Co. (S. C.)*, 9 Ry. & Copp. L. J. 129; *Crandall v. Nevada*, 6 Wall. (U. S.) 35.

⁴⁶ *Ratterman v. West. U. Tel. Co.*, 127 U. S. 411.

⁴⁷ *Wabash St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244; *West. U. Tel. Co. v. Texas*, 105 U. S. (15 Otto.) 460, 26 L. Ed. 1067; *Hall v. Decier*, 95 U. S. (5 Otto.) 485; 24 L. Ed. 547; *The Daniel Ball*, 77 U. S. (10 Wall.) 557, 19 L. Ed. 999.

stated.⁴⁸ Where a statute required a statement to be made by the chief manager of the telegraph company, of the entire number of full-rate and half-rate messages of the company, and that thus the amount of taxes due should be ascertained, a tax upon certain of the messages was held unconstitutional; but the law contained no direction requiring discrimination in the report between the messages that could be legally taxed and those that could not, and the entire law was held inoperative and void.⁴⁹

§ 663. Municipal tax—compensation—use of streets.

It has been held in a recent case that a municipal corporation may impose a tax on telegraph companies as a compensation for the use of its streets.⁵⁰ The court adjudged that such tax was neither a

⁴⁸ *West. U. Tel. Co. v. Com.*, 110 Pa. St. 405, 20 Atl. 720, reversed in 128 U. S. 39; also, *West. U. Tel. Co. v. State Board*, 80 Ala. 273, 60 Am. St. Rep. 99, reversed, in 145 U. S. 472; *Mobile v. Port of Mobile*, 76 Ala. 401, reversed, in 127 U. S. 640.

⁴⁹ *West. U. Tel. Co. v. Texas*, 62 Tex. 630.

⁵⁰ *City of St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. Rep. 485. In the course of the opinion in that case, it was said: "And first with reference to the ruling that this charge was a privilege or license tax. To determine this question, we must refer to the language of the ordinance itself, and by that we find that the charge is imposed for the privilege of using the streets, alleys and public places, and is graduated by the amount of such use. Clearly, this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of the property belonging to the city—that which may properly be called rental. 'A tax is a

demand of sovereignty; a toll is a demand of proprietorship.' *State Freight Tax Case*, 15 Wall. 232, 278. If, instead of occupying the streets and public places with telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. Suppose the city of St. Louis should find its city hall too small for its purposes, or too far removed from the center of business, and should purchase or build another more satisfactory in this respect, it would not therefore be forced to let the old remain vacant or to immediately sell it, but might derive revenue by renting its various rooms. Would an ordinance fixing the price at which those rooms could be occupied be in any sense one imposing a tax? Nor is the character of the charge

privilege tax nor a license tax. There is a reason for discriminating between a tax imposed on these companies for the use of streets in a city and a license or privilege tax, but the distinction between the two is not very clear, and unless there is a clear understanding of the distinction there is danger of great abuse arising therefrom. In determining such questions, the ordinance providing for such taxing power should be resorted to, since from this alone can it be ascertained as to whether the tax is imposed as a compensation.

§ 664. City license tax on telegraph companies.

It is held in Virginia that a city can impose a license fee upon a telegraph company or agency for business done exclusively therein, not including interstate business or business for the government. And it may impose such license tax upon an agency of interstate commerce such as these companies, provided it is not in excess of that to which the property of the company within the jurisdiction of the city would be subject under the ordinary modes of taxation, but it cannot levy a tax upon such company, in excess of what an ad valorem tax on its property within the city would be. Nor can it make the payment of this tax a condition precedent to the right to transact business.⁵¹

§ 665. Special franchise taxes.

A new form of taxation, of very great importance, was introduced in New York state by the statute of 1899, making all franchises for the use of streets, highways, or public places, by railroads of any kind, or mains, pipes, tanks, conduits, or wires for any purpose, taxable as special franchises, and to be deemed real property. Great corporations have persistently fought it, until now, by decision of the United States Supreme Court, they are compelled to submit to

changed by reason of the fact that it is not imposed upon such telegraph companies as by ordinances are taxed on their gross income for city purposes. In the illustration just made in respect to a city hall, suppose that the city, in its ordinance fixing a price for the use of rooms, should permit

persons who pay a certain amount of taxes to occupy a portion of the building free of rent, that would not make the charge upon others for their use of rooms a tax."

⁵¹ *Postal Tel. Co. v. City of Richmond*, 99 Va. 102, 37 S. E. 789, 86 Am. St. Rep. 877.

it.⁵² The main contention of the corporations against the validity of this tax was that it impaired the obligation of the contracts under which these franchises were obtained. Corporations which had paid a gross sum to obtain a franchise, or were required to pay annually either a fixed amount or a fixed percentage of their earnings, contended that such payments were all that the state could demand of them on account of such franchise. But the court held that the contract did not provide that these payments were to be in lieu of or an equivalent or substitute for taxes. As the state had not expressly relinquished the right to tax them, what they had paid for the grant of a privilege raised no implication of any relinquishment of the power to tax its value as in case of other property. The fact that the property was of an intangible kind made it no different in this respect from a grant of tangible property, like a tract of land. It was contended in one case that the valuation of such franchise was mere guesswork and speculation, which could not constitute process of law, but the court briefly disposed of this contention, holding that it had no merit where such valuation was made by a state board to which the owner of the franchise was required to furnish a written report, with notice and hearing accorded the owner and review of the assessment afforded by certiorari. The fact that some corporations were previously subjected to annual payments "in the nature of a tax," under these existing contracts, and that these were the statutes allowed to be deduced from the special franchise tax, was claimed to be a discrimination against other companies who had paid a lump sum for their franchises, and to deprive them of their property without due process of law, or to deny them the equal protection of the laws. But it was held that these constitutional rights were not thus impaired. There has been no case, to our knowledge, arising directly against telegraph or telephone companies on this subject, but we presume the same law is applicable in that state to these companies.

§ 666. Where rights of being a corporation are derived from the United States.

In many instances, telegraph companies derive their privileges and franchises from the United States; and where they have a situs in a

⁵² 25 Sup. Ct. R. 705.

state, the latter may impose a tax upon the property of these companies notwithstanding this fact. It is the property of the company that is subject to such tax, and not the business. This is one fact which should be clearly understood, otherwise great confusion will most surely be the result. That is, a telegraph company having its situs within a state may have its property in that state taxed although its franchise is derived from the United States, and for the purpose of carrying on commerce between the states; but the business or operation of such company cannot be taxed, since that would be a tax upon interstate commerce.⁵³ A state tax upon a franchise derived from the United States is void as an attempt to tax the operation of an instrument of the general government.⁵⁴

§ 667. Interest when payment of taxes is delayed.

Under a statute providing that interest shall be charged upon all taxes not paid on or before a specified date, a telegraph company is liable for interest from the date prescribed, on the amount of taxes payable by it, notwithstanding the fact that payment was delayed pending the decision of an appeal taken from the assessment, in which a reduction of the assessment was obtained.⁵⁵ If the taxes are such as ought not to be paid, the company has a remedy for not paying same. But in order to protect the company from paying interest on the taxes for the delayed payment, the company should tender the amount for which it is assessed.

§ 668. Taxes of telephone companies.

All that has been said in regard to the law of taxing telegraph companies is applicable to telephone companies as well. There is nothing peculiar in the taxation of these companies differing from that of the taxation of other similar corporations. A message sent by telephone from one state into another is commerce between the

⁵³ *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 14 Sup. Ct. Rep. 1060; *West. U. Tel. Co. v. Att.-Gen.*, 125 U. S. 530, 8 Sup. Ct. Rep. 961; *City of St. Louis v. West. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. Rep. 485.

⁵⁴ *City of San Francisco v. West. U. Tel. Co.*, 39 Am. & Eng. Corp. Cas. (Cal.) 601.

⁵⁵ *West. U. Tel. Co. v. State*, 64 N. H. 265. See *Cooley on Tax.* (2 Ed.) 456.

states, and cannot be prohibited or regulated by injunction in either state against persons or corporations engaged in sending such messages, because they do not pay the taxes assessed against them by such state, since the effect of such an injunction, if permitted, would utterly suspend the business of the company and defeat all of its operations within the state enforcing such injunctions.

T. & T.—41

CHAPTER XXVIII.

TELEGRAPH AND TELEPHONE COMMUNICATIONS AS EVIDENCE.

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- 701. Oaths admissible by means of telephone.

§ 669. In general.

We shall now discuss the law with respect to the admission of telegrams as evidence. In assuming this undertaking we shall first discuss the manner of proving the contents of telegrams, then the

admission of such with respect to the statute of frauds, and, lastly, we shall speak of such evidence as a privileged communication. In this chapter, we shall only discuss the first of these subdivisions, the manner of proving the contents of telegrams, and leave the other to be treated in subsequent chapters. In taking up the subject which we propose to discuss at present, we shall, after discussing the subject in general, speak of the best proof, or such as is termed primary, then such as is secondary, after which we shall say something of telephone communications.

§ 670. What is a telegram.

Before entering into this subject, however, we shall see what is meant by the term "telegram." A telegram is a message sent by telegraph;¹ but under some circumstances a message sent over a telephone line is considered a telegram.² In England, there was a law³ which empowered the postmaster-general to work and maintain telegraphs for the benefit and use of the public. It was held that conversations over or through telephone lines were "messages" or, at all events, "communications transmitted by telegraph," and, therefore, "telegrams" within the meaning of the act; and that, since the company made a profit out of the rents, conversations held by subscribers through their telephones were infringements of the exclusive privileges of transmitting telegrams granted to the postmaster-general by those acts.

§ 671. Letters and telegrams—compared.

There is a similarity between the means of communicating news by telegraph and by the postal system, with respect to the proof of the delivery of the news to the party addressed. Where a letter is duly posted, stamped and addressed for transmission by means of the United States mail, it is presumed that such letter reached its destination. A telegraph company is engaged in a public service, and is duty bound to transmit and deliver all messages entrusted to its care. Having assumed this duty, a similar presumption arises;

¹ Int. Dec.

² Telegraph Act, 1863 and 1869.

³ 6 Q. B. Div. 244; 29 Moak 602.

that is, that the message was delivered.⁴ The presumption is that letters properly directed and mailed were received, and the same is true of telegrams given to a telegraph company for transmission and properly addressed,⁵ and the presumption becomes conclusive when not denied.⁶

§ 672. Same continued—admission of.

The general rule, relative to the admission of a letter in evidence against the person who is supposed to have written it, is, that it must first be proved that the letter was written by such person or by his request or authority. This may be done by comparing the written letter with other writings of his, or by any other evidence which will show that he had it done for himself. When it is shown by competent evidence that he is the author of the letter, it may then be admitted in evidence against him. If, however, the letter is in reply to one written to the person against whom it is to be admitted, it is not necessary to prove the latter's signature, but all that is necessary is to prove that the letter is one in reply to one written to such person in regard to the subject at issue. The rule relative to the admission of telegrams, with some exceptions, is similar to the above.⁷ Thus, in order to admit a telegram in evidence against the sender, it must be first proved that he is the author of the telegram, and the same proof

⁴ *Perry v. German American Bank*, 53 Neb. 89, 73 N. W. 538, 68 Am. St. Rep. 593; *West. U. Tel. Co. v. Call. Pub. Co.*, 44 Neb. 326, 27 L. R. A. 622, 48 Am. St. Rep. 729, 62 N. W. 506; *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 53 Am. St. Rep. 221. See, also, *Eppinger v. Scott*, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301, 44 Pac. 723.

⁵ *Com. v. Jeffries*, 7 Allen 548, 83 Am. Dec. 717, and note. A telegram is presumed to have been delivered in the regular course of business to the person to whom it was directed. The fact that the telegram was sent is therefore admissible in evidence, and tends to prove that it was received: *Eppinger v. Scott*, 112 Cal. 369, 53 Am. St.

Rep. 320, 42 Pac. 301, 44 Pac. 723; *Perry v. German American Bank*, 53 Neb. 89, 73 N. W. 538, 68 Am. St. Rep. 593.

⁶ *Oregon Steamboat Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221; *Austin v. Holland*, 67 N. Y. 571, 25 Am. Rep. 246; *Eppinger v. Scott*, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301, 44 Pac. 723.

⁷ *United States v. Babcock*, 3 Dill. (U. S. 571; *Southern R. Co. v. Howell*, 135 Ala. 639; *Com. v. Burton*, 183 Mass. 461, 67 N. E. 410; *People v. Hammond*, 93 N. W. (Mich.) 1084; *Coupland v. Arrowsmith*, 18 L. T. N. S. 755.

may be resorted to in this instance as that adopted for the proof of the authorship of letters. And while it may be admitted in evidence in the absence of proof of the sender's handwriting, when it is in reply to a letter written to such person, yet the general rule is that it cannot be admitted in the absence of such proof when it is in reply to a telegram sent to such person.⁸ The reason for this rule may be readily seen. Where it is in reply to a letter, the signature of the author thereof may be known by the recipient thereof, or it is in such a place as to be known by him; but in the case of signatures to telegrams, the recipient of the latter has no means of ascertaining the genuineness of such, more than what the operator may tell him. The rule, however, would be different where the message is transmitted by means of the late improvements made in telegraphy, and which will be hereafter discussed. In these cases, the same rule would apply as where the message is in reply to a letter.⁹

§ 673. Same continued—presumption—exceptions.

Where a letter has been received from a certain place in reply to a letter written to such person at such place, it is a presumption that

⁸ *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Howley v. Whipple*, 48 N. H. 487. See, also, *Ovenston v. Wilson*, 2 C. & K. 1, 61 C. L. 1. Compare *Thorp v. Philbin*, 15 Daly (N. Y.) 155; *People v. Hammond*, 93 N. W. (Mich.) 1084.

⁹ *Gray on Tel.* 135. This writer says: "The principle upon which it is admitted is that the person who answers a letter is almost invariably the person to whom it is addressed. This principle, since it is entirely independent of the question of handwriting, applies, apparently, with equal force to communication by telegraph. But it does not in reality do so. It is true that the person who answers a telegraph message is usually the person to whom it is addressed. It is also true, however, that while it is unnecessary to disclose the intelligence contained

in a letter to any one to effect its transportation by mail, it is absolutely necessary to disclose intelligence to at least two operators to effect its transmission by telegraph. Consequently, the telegraph offers far greater opportunity to deliver fraudulent answers to inquiries than the mail does. This distinction renders the principle at present under consideration inapplicable to communications by telegraph, however sound its application to communications by mail may be deemed to be. The message written at the place of destination might be admissible to prove the authorization of the apparent sender, if it purported to be an answer to a letter proved to have been properly mailed to him, the opportunity to deliver fraudulent answers to inquiries in that form being comparatively slight."

he was at that place at the time the letter was mailed.¹⁰ A different rule applies in case of telegrams. Thus, where a telegram was forwarded to a person at a certain place, and an answer purporting to be from him was received in due course, this is no evidence that such person was at that place at that particular time. "In the case of telegraphic communications, the ground of belief amounts merely to this: that the operator at one end of the line has informed the operator at the other end, of the presence of the sender of the answer. This is mere hearsay."¹¹ But a receipt of a message over the wires at the point of destination creates a presumption that the message was sent from the office from which it purports to come.¹²

§ 674. Authorship must be proved.

As said heretofore, the authorship of a telegram must be proved before it can be admitted in evidence. If it is a reply to a letter, it is enough to show such fact; but if the original telegram is introduced, the handwriting of the sender must be shown, or other evidence of the genuineness must be given.¹³ The authenticity of certain telegrams is sufficiently proven, *prima facie* at least, where one in an agreed cipher was proved to a certainty, others were referred to in exhibits of the opposite party, and still others contained directions to draw drafts which were shown to have been drawn and paid.¹⁴ So, also, testimony of the recipient that he received the message and the admission of the sender that it is the message he sent, is abundant proof of the authenticity of the message.¹⁵ But where the sender testifies that the message was in her own handwriting and was sent by her, a dispatch taken from the company's files of about the same date, purporting to be signed by her and referring to the subject-matter in question, is not admissible if not in her handwrit-

¹⁰ 1 Green. Ev. (14 Ed.), § 578.

¹¹ Howley v. Whipple, 48 N. H. 487.

¹² Elwood v. West. U. Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140.

¹³ Richie v. Bass, 15 La. Ann. 668; Burt v. Winona, etc., R. Co., 31 Minn. 472, 18 N. W. 289; Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; Reynolds v. Hendricks (S. Dak.), 94 N. W.

694; Chester v. State, 23 Tex. App. 577. See, also, Eppinger v. Scott, 112 Cal. 369, 53 Am. St. Rep. 220, 42 Pac. 301, 44 Pac. 723.

¹⁴ Oregon S. S. Co. v. Otis, 150 N. Y. 446, 53 Am. Rep. 221.

¹⁵ Dunbar v. United States, 156 U. S. 185.

ing.¹⁶ A paper offered in evidence, purporting to contain a dispatch received at a telegraph office, is not admissible as evidence when no proof is given that it was in the handwriting of any person employed in the telegraph office where it purports to have been received, and no other proof of its authenticity is given.¹⁷

§ 675. Proof of signature.

The same manner of proof necessary to prove a person's signature to a letter is applicable in the proof of signatures to telegrams. Thus, evidence founded on mere comparison of handwriting is not admissible as a general rule, to prove the genuineness of a signature;¹⁸ but it is held that an expert may give his opinion from mere comparison.¹⁹ Testimony by comparison of handwriting is admissible in corroboration of previous testimony.²⁰ So, if the witness has previous knowledge of the hand, he may, in corroboration of his testimony compare the writing with other signatures known to be genuine.²¹ Writings used as standards in comparison of hands must be proved to be genuine. So, letter-press copies of letters found in the party's letter-book, are not admissible as standards of comparison to prove the genuineness of a signature, but original signatures must be used.²² In some instances, however, press copies may be admitted as secondary evidence, but not for comparison. When such is introduced, the witness should be asked if it appears to be in the handwriting of defendant; then, by proving that it is a press copy, it would follow that the letter from which the impression was made is defendant's also. He should not be asked: "In whose handwriting was the original of which this purports to be a copy?" This question elicits the opinion of the witness concerning the handwriting and the necessary consequence of that opinion, in the same answer.²³

¹⁶ *Lewis v. Havens*, 40 Conn. 363.

¹⁷ *Richie v. Bass*, 15 La. Ann. 668.

¹⁸ *Clark v. Wyatt*, 15 Ind. 271, 77 Am. Dec. 90.

¹⁹ *Chance v. Indianapolis, etc., R. Co.*, 32 Ind. 474; *Fargry v. First Nat. Bank*, 66 Ind. 125.

²⁰ *Baker v. Haines*, 6 Worthon 284. 36 Am. Dec. 224.

²¹ *Shank v. Butch*, 28 Ind. 21.

²² See 48 Am. Dec. 596, and notes.

²³ *Com. v. Jeffries*, 7 Allen 548, 83 Am. Dec. 712.

§ 676. Telegrams as declarations of sender.

When a telegram is shown to have been delivered for transmission, and it is proven that the signature to same is that of the sender, such telegram may be admitted as the sender's declaration.²⁴ Thus, evidence that a telegram was sent by the defendant to the drawee of an order which he had given to plaintiff, directing the drawee to withhold a part of the amount specified and to pay the remainder, is competent as tending to show an admission by the defendant of indebtedness, at least to the extent of the amount of such remainder.²⁵ The general rule is, that a wife cannot testify in a criminal case against her husband, unless the charge is one which has been committed on her by him.²⁶ So, a telegram from a wife of one of the defendants in an action for conspiracy, not written nor sent by either of them, is inadmissible as evidence against them. As the declaration of the wife, it could not effect even her husband.²⁷

§ 677. Telegrams as evidence of communication.

Business affairs may be transacted by means of telegrams as well as by means of correspondence by letter, and when there is an action arising over a business transaction, all letters sent or received by the parties to the action and in regard to the matter at issue, may be admitted in evidence. So, when it is shown that telegrams have been received in due course from either party, they may be admitted as evidence of the communication between the parties.²⁸ They may also be admitted to show the information upon which the addressee may have acted, where his good faith or his intentions are in question:

²⁴ *Com. v. Jeffries*, 7 Allen 548, 83 Am. Dec. 712. See, also, *People v. Hammond*, 93 N. W. (Mich.) 1084.

²⁵ *Griggs v. Deal*, 30 Mo. App. 152. See, also, *Buford v. Samuel*, 40 Pa. St. 9, 80 Am. Dec. 545.

²⁶ *State v. Jolly*, 3 Devereux and Battle's Law 110, 32 Am. Dec. 656.

²⁷ *Buford v. Samuel*, 40 Pa. St. 9, 80 Am. Dec. 545.

²⁸ *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712; *Taylor v. Steamboat Robert Campbell*, 20 Mo.

254. Telegrams transmitted to plaintiff in attachment suits by telephone, and reduced to writing by the person who received them, and in that form acted upon by plaintiff, are admissible as showing the information upon which the attachment was sued out; and it is not necessary that the dispatches should be verified by comparing them with the originals on file with the telegraph company. *Deere v. Bagley*, 80 Iowa 197, 45 N. W. 557.

provided it is shown that he read and acted upon them.²⁹ Thus, a telegram sent by telephone and reduced to writing by the person receiving it, may be admitted as showing information on which a plaintiff acted in suing out an attachment. It is not necessary, in such a case, that they should be verified by comparing them with the originals on file in the company's office; the question in such a case is, not what the original messages contained, but what was contained in them when they reached the plaintiff.³⁰

§ 678. Rule applicable to documentary evidence.

It would be foreign to the purpose of this treatise to discuss the general rule in relation to the admission of evidence pertaining to documentary evidence, but suffice it to say, the general rule governing such evidence is applicable in the case of telegrams.³¹ As a rule, however, in order for the message to be admitted against anyone, it must be shown that he is a party to the message, either as the sender or receiver.³² Thus, correspondence by wire between operators sending and receiving a message, which was not communicated to the sender, is not admissible to show that the person to whom the message was directed was absent from the place of delivery.³³ So, also, letters and telegrams as to the cancellation of an insurance policy, sent by an insurance company to its agent after a loss, are not admissible against the insured in an action on the policy.³⁴ There may

²⁹ *J. K. Armsby Co. v. Eskerly*, 42 Mo. App. 299.

³⁰ *Deere v. Bagley*, 80 Iowa 197, 45 N. W. 557.

³¹ *Com. v. Vasburg*, 112 Mass. 419; *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54, 26 Mo. App. 390; *Buford v. Samuel*, 40 Pa. St. 9, 80 Am. Dec. 545; *Eldridge v. Hargreaves*, 30 Neb. 638, 46 N. W. 923; *Hammond v. Beeson*, 15 S. W. (Me.) 1000; *State v. Espuozie*, 20 Nev. 209, 19 Pac. 677; *International, etc., R. Co. v. Prince*, 77 Tex. 560; *Powell v. Brunner*, 86 Ga. 531, 12 S. E. 744; *J. K. Armsby Co. v. Eskerly*, 42 Mo. App. 299; *Rich-*

mond v. Sundburg, 77 Iowa 255; *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 1 L. R. A. 728, 10 Am. St. Rep. 772; *West. U. Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

³² *Powell v. Brunner*, 86 Ga. 531, 12 S. E. 744; *People v. Hammond*, 93 N. W. (Mich.) 1084.

³³ *West. U. Tel. Co. v. Cooper*, 71 Tex. 507, 1 L. R. A. 728, 10 Am. St. Rep. 772.

³⁴ *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54, 26 Mo. App. 390. See also, *Larinin v. Carley*, 114 Ill. 196.

be, however, some exceptions to the rule. Thus, where an action is brought to recover the price of goods sold, a telegram countermanding the order for such goods, although it was sent to one not a party to the action, is admissible when it appears that it was intended to be delivered to the sellers of the goods and that it actually came into their possession and was replied to by such parties.³⁵

§ 679. Primary evidence—in general.

One of the general rules of the law of evidence is, that the best obtainable evidence must be adduced in court, or such as is generally termed primary evidence. It has been a rule repeatedly enunciated by the courts from the earliest times that the highest degree of proof of which the case from its nature is susceptible must, if obtainable, be produced; or, in other words, that no evidence shall be adduced which presupposes that the party offering it can obtain better evidence.³⁶ "The object of the rule of law," as was ably said, "which requires the production of the best evidence of which the fact sought to be established is susceptible, is the prevention of fraud; for if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes which its production would expose and defeat."³⁷ This rule does not mean that the strongest possible evidence of the matter at issue shall be given, or that all evidence in the case shall be produced; but it requires simply that no evidence shall be given which, from its nature, may warrant the inference that there is obtainable by the party evidence more direct, conclusive and original. In other words, it means that the most direct, satisfactory and conclusive evidence obtainable, and that of the highest degree or grade, must be produced.³⁸

³⁵ *Eldridge v. Hargreaves*, 30 Neb. 638, 46 N. W. 923.

³⁶ *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49; *Storm v. Green*, 51 Miss. 103; *Clifton v. U. S.*, 4 How. 242, 11 L. Ed. 957; *Church v. Hubbard*, 2 Cranch 187, 2 L. Ed. 249; *Ward v. Hohn*, 58 Fed. 462, 7 C. C. A. 314.

³⁷ *Bagley v. McMickle*, 9 Cal. 430.

³⁸ *Elliott v. Van Buren*, 35 Mich. 49, 20 Am. Rep. 668; *West. U. Tel. Co. v. Stevenson*, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515; *Zang v. Wyatt*, 25 Cal. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

§ 680. Rule applicable to documentary evidence only.

This rule is applicable to the admission of documentary evidence only, since there is no primary and secondary evidence to such as may be oral. In other words, the testimony of one witness cannot be excluded on the ground that another might give more conclusive evidence.³⁹ If two parties claim that they are familiar with the circumstances of a particular transaction, but their statements in regard to same are conflicting, it is within the province of the jury to determine which statement is the more correct, and it is never the duty of the court to exclude the testimony of one witness because it may think that of another is better. Where, however, documents or other written instruments exist, the contents of which are in dispute, the original should be produced to prove such contents rather than to prove it by other evidence which would be open to the charge of inaccuracy.⁴⁰ In some instances, however, and more particularly with respect to proving telegrams, parol evidence may be best: which fact we shall speak of later.

§ 681. Rule applicable to telegrams.

The principal question involved in the consideration of the admission of telegrams as evidence to prove their contents is, What is the best evidence to prove such facts? The general rule is, that the original telegram, when obtainable, shall be produced; but it is not an easy matter in every instance to determine what is the original telegram. In such communications there are two distinct documents; the one delivered by a person to the company for transmission, and the other delivered by the company to the person to whom it was sent. The contents of these two may be identical; and while the presumption may be that they are the same, yet it is not the case in every instance. So, the presumption is not a conclusive one. It is generally held that this question depends upon the further question as to who the company represented as agent, the sender or the recipient of

³⁹ *Nelson v. Boyston*, 3 Mete. 396, 37 Am. Dec. 148; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668.

⁴⁰ *Elliott v. Van Buren*, 33 Mich. 49,

20 Am. Rep. 49. 20 Am. Rep. 668; *Hencky v. Smith*, 10 Oreg. 349, 45 Am. Rep. 143.

the message? In other words, if the person sending the message takes the initiative so that the company is to be regarded as his agent, the message actually delivered at the end of the line is the original and primary evidence; but if the person to whom the message is sent takes the risk of its transmission, or is the employer of the company, the message delivered to the operator is the original.⁴¹

§ 682. Depends upon which document is at issue.

The proper solution of this question, we think, depends upon which document is at issue. In other words, it depends upon whether the contents of the message delivered by the sender to the company are at issue, or whether it is the contents of the message delivered by the company to the addressee. The message delivered to the company is the original whenever the words authorized to be sent and which were thereupon agreed to be transmitted and delivered to the addressee are in issue.⁴² It is necessary to prove these words, whenever a company is sued for a breach of contract,⁴³ that is, the rule applies to cases in which the telegraph company is a party. So, also, when the message is offered as a declaration by the sender in a criminal proceeding, or as an admission in a civil action, the message as tendered to the company for transmission is the original and best proof.⁴⁴

§ 683. Same continued—contents of message delivered to addressee.

Whenever the words which the company actually delivered to the person to whom the message was sent are at issue, the message delivered to such person is the original and best evidence. So, when the message relates to a contract between the sender and addressee, made by means of a telegram, the rule is that the nature of the contract depends upon the message delivered to the addressee; or, in other words, to be more clear on this subject, if the addressee is under legal obligation to obey the telegraphic orders of another, the

⁴¹ *Saveland v. Green*, 20 Wis. 431.

⁴² *Gray on Tel.* 233 and note.

⁴³ *Gray on Tel.* 234 and note.

⁴⁴ *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712. See, also, *Morgan v. People*, 59 Ill. 58.

message transmitted and delivered to him and not what was intended or directed to be sent, contains the best proof of such facts, and should, therefore, be adduced in evidence,⁴⁵ and this, too, without accounting for the message tendered to the company for transmission.⁴⁶ This is not, however, always the rule. If, for instance, the addressee suggest that the telegraph company be used as a means to consummate the contract, this fact will make the company the agent for the addressee, and the message which was delivered to the company will be the original and best evidence.⁴⁷ If the action is based merely on the delay in delivery, the message delivered to the addressee is the best evidence to prove such fact without proof of the message delivered to the company,⁴⁸ especially where there is no dispute as to the contents of the two.⁴⁹

§ 684. Messages given orally for transmission.

The best evidence to prove the contents of a message given for transmission is not always by a written telegram, but in order to exclude as a copy the message transmitted and delivered, it must appear that the message given for transmission was in writing, since there can be no copy of an oral communication.⁵⁰ Where it is sought

⁴⁵ *Illinois*.—*Anheuser-Busch Brewing Assoc. v. Heitmoeher*, 127 Ill. 652, 4 L. R. A. 575, 21 N. E. 626, affirming 29 Ill. App. 316; *Chicago, etc., R. Co. v. Russel*, 91 Ill. 298, 33 Am. Dec. 54; *Matteson v. Noys*, 25 Ill. 591.

Kansas.—*Barous v. Brown*, 25 Kan. 414.

Massachusetts.—*Nickerson v. Spindell*, 164 Mass. 25, 41 N. E. 105.

Minnesota.—*Wilson v. Minneapolis, etc., R. Co.*, 31 Minn. 481, 18 N. W. 291; *Magie v. Herman*, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660.

New Hampshire.—*Howley v. Whipple*, 48 N. H. 487.

New York.—*Thorp v. Philbin*, 15 Daly 155.

Vermont.—*Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

West Virginia. — *Merchants' Nat. Bank v. Wheeling First Nat. Bank*, 7 W. Va. 544.

⁴⁶ *Saveland v. Green*, 40 Wis. 431; *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221.

⁴⁷ *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355. See, also, *Pegram v. West. U. Tel. Co.*, 100 N. C. 28, 6 Am. St. Rep. 557, 6 S. E. 677.

⁴⁸ *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100; *West. U. Tel. Co. v. Bates*, 93 Ga. 302, 20 S. E. 639; *West. U. Tel. Co. v. Blanse*, 94 Ga. 431, 19 S. E. 253.

⁴⁹ *West. U. Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877.

⁵⁰ *Bank v. Richardson*, 47 N. C. 109. In this case, it was held that dots and dashes made on paper at the

to show by parol evidence the contents of a message delivered to the company's operator, it cannot be objected that the evidence offered was not the best evidence, unless it be shown that the message delivered to the operator was in writing; and since, as a matter of fact, many telegrams are communicated orally by the sender to the operator, the court cannot conclude, without proof, that telegrams given to an operator in any given case were in writing.⁵¹ The general rule would clearly be applicable where it is sought to prove by parol the contents of a message transmitted and delivered, if it appeared that the message transmitted was delivered orally to the recipient without being reduced to writing.⁵²

§ 685. Actions to recover statutory penalties and damages.

In an action against a telegraph company to recover damages or a statutory penalty for failure to transmit and deliver a message with due diligence, the issue being not as to the contents of the telegram, but as to failure or delay in transmission and delivery, the message actually delivered by the company is admissible in evidence without producing or explaining the absence of the message delivered by the sender to the company.⁵³ There was one case, however, which held that the telegram delivered to the operator was the original and should have been produced.⁵⁴ This case has been later disapproved.⁵⁵ But it has been held that, if in such an action, the contents of the telegram sent are material, the loss by plaintiff of the telegrams received will not lay the foundation for introducing parol evidence of the contents without accounting by notice to produce, or otherwise,

telegraph office cannot constitute the original of a message when the words of the message are put in writing by the operator.

⁵¹ *Terre Haute, etc., R. Co. v. Stockwell*, 118 Ind. 98, 20 N. E. 650. See, also, *Bank v. Richmond*, 47 N. Car. 109.

⁵² *Durke v. Vermont Cent. R. Co.*, 29 Vt. 127.

⁵³ *West. U. Tel. Co. v. Blance*, 94 Ga. 431, 19 S. E. 255; *West. U. Tel. Co. v. Bates*, 93 Ga. 352, 20 S. E. 639;

Conyers v. Postal Tel. Cable Co., 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100; *West. U. Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *West. U. Tel. Co. v. Cline*, 8 Ind. App. 364, 35 N. E. 564. See, also, *West. U. Tel. Co. v. Smith*, 26 S. W. (Tex.) 216.

⁵⁴ *West. U. Tel. Co. v. Hopkins*, 49 Ind. 223.

⁵⁵ *Reliance Lumber Co. v. West. U. Tel. Co.*, 58 Tex. 394, 44 Am. Rep. 620.

for the non-production of the telegrams written and delivered by the sender for transmission.⁵⁶

§ 686. Secondary evidence.

It is a general rule of evidence that when written evidence of a fact exists, the writing constitutes the best evidence of the fact; and where the writing is not produced, parol evidence cannot be admitted to prove its contents, unless the absence of the writing is satisfactorily explained. In other words, parol evidence is not admissible in substitution for available written evidence, and the contents of a writing cannot be proved by parol evidence.⁵⁷ The contents of a letter may be proved by secondary evidence, where such letter, if existing, would itself be admissible. And this is so when the destruction of such letter is shown to have arisen from misapprehension, and was without any fraudulent purpose, though such destruction was the party's voluntary act.⁵⁸ Such evidence must not only appear to be the best secondary evidence, but it must be the best legal evidence obtainable under the circumstances.⁵⁹ The rule which governs the admission of secondary evidence of the contents of documents generally, apply to the admission of secondary evidence of the contents of a telegraph message. Thus, the contents of a telegram cannot be proved by testimony of the person to whom it is sent, without producing the original or accounting for its absence.⁶⁰

⁵⁶ *West. U. Tel. Co. v. Hines*, 94 Ga. 430, 20 S. E. 349, disapproving and limiting *Cincinnati, etc., R. Co. v. Desbrow*, 76 Ga. 253. But see, *West. U. Tel. Co. v. Thompson*, 18 Tex. Civ. App. 279, 44 S. W. 402.

⁵⁷ *Newsom v. Jackson*, 26 Ga. 241, 71 Am. Dec. 206; *Boyston v. Rees*, 8 Pick. 329, 19 Am. Dec. 326; *Johnson v. Arunwine*, 42 N. J. L. 451, 36 Am. Rep. 527.

⁵⁸ *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547.

⁵⁹ *Philipson v. Bates*, 2 Mo. 116, 22 Am. Dec. 444.

⁶⁰ *Alabama*.—*McCormick v. Joseph*,

83 Ala. 401, 3 So. 796; *Whilden v. Merchants', etc., Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1.

Arizona.—*Yavepai County v. O'Neil*, 29 Pac. 430.

Georgia.—*West. U. Tel. Co. v. Hines*, 94 Ga. 430, 20 S. E. 349.

Indiana.—*West. U. Tel. Co. v. Hopkins*, 49 Ind. 223.

Mississippi. — *Williams v. Brickill*, 37 Miss. 682, 75 Am. Dec. 88.

Nebraska.—*Veiser v. Cathers*, 97 N. W. 840.

Texas.—*Prather v. Wilkins*, 68 Tex. 187; *West. U. Tel. Co. v. Williford*, 27 S. W. 700.

§ 687. Proof of absence of the original.

As was said, in order to produce secondary evidence of the contents of a message, it must be shown by sufficient proof that the original has been lost, destroyed or is otherwise not obtainable. It is not an easy matter to make a fixed rule by which the admission of such evidence is to be governed, but the circumstances of each particular case must be considered in making such rule. There must be sufficient proof adduced by the party offering such evidence that the original has been lost or destroyed, and that he has made diligent efforts to find same.⁶¹ Thus, where the employee of the company testified that he worked at the office at which the telegram was received, that the message could not be found there, and that under the rules of the company messages were sent to the head offices to be destroyed after remaining at the receiving office for six months, this is sufficient to show the impossibility of obtaining the original.⁶² It is not competent, however, for the messenger of the receiving office, to testify from information that the message filed with him had been destroyed by the employees of the head offices.⁶³ When the employee, who, at the time of testifying but not at the time of receipt, had possession of the papers and books of the office from which the message was transmitted, testified that none of the messages forwarded from the office on the day on which the message sent were in the office, and that he supposed all such messages had been destroyed, as it was the custom to destroy them after six months, the destruction of same is not established by the testimony of such employee.⁶⁴ While the testimony of such employee may prove the absence of the message from the office, yet it would not establish the destruction of it, which could only be done by the officer causing the destruction.⁶⁵ It was held in one case, that the addressee might testify to the contents of a message where the sender, who was a party to the action, did not deny having sent it and where the contents are set out in the declara-

⁶¹ *Flint v. Kennedy*, 33 Fed. 820.

⁶² *Riordan v. Guggerty*, 74 Iowa 688, 39 N. W. 107; *West. U. Tel. Co. v. Collins*, 45 Kan. 88, 10 L. R. A. 515n, 25 Pac. 187; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am.

Rep. 221, 14 Abb. N. Cas. (N. Y.) 388. See, also, *People v. Hammond*, 93 N. W. (Mich.) 1084.

⁶³ *American U. Tel. Co. v. Dougherty*, 89 Ala. 191, 7 So. 766.

⁶⁴ *Barons v. Brown*, 23 Kan. 410.

⁶⁵ 1 Greenl. Ev., § 84n.

tion.⁶⁶ This is not the rule where the original is not accounted for, but was admitted on the ground of its harmlessness.

§ 688. Notice to produce.

In order that secondary evidence may be admitted to prove the contents of a telegram, the rule is that the party offering to produce such evidence should, if the original is in the possession or under the control of the adverse party to the suit, give him sufficient notice to produce it. If the telegram is in the possession of a stranger to the action, and who is not legally bound to produce it, the person offering to produce secondary evidence of its contents must have served a subpoena *duces tecum* upon such stranger. Where the telegram is alleged to have been lost or destroyed, it must be shown, as said, that diligent search has been made for the original.⁶⁷ This is the rule where the telegraph company is not made a party to the action, for the rule does not apply where the original message is the foundation of the action, and the adverse party must know from the very nature of the case that it is charged with the possession of it. For instance, in an action against a company for the breach of a contract to communicate a message, the plaintiff need not give the defendant notice to produce that message; he may immediately resort to parol evidence to prove the contents.⁶⁸ This rule has been contradicted,⁶⁹ but we think that it was wrongly so.

§ 689. What evidence admissible as secondary.

When it is sufficiently shown that the original telegram cannot be produced to prove its contents, the question which then presents itself is, What evidence should be produced as being the next best evidence? As said elsewhere, when the original or best evidence cannot be produced, the next accessible evidence to prove such fact must be produced.⁷⁰ If the company preserves letter-press or other copies of

⁶⁶ *Williams v. Brickell*, 37 Miss. 682.
75 Am. Dec. 88. See, also, *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221.

⁶⁷ *Stephen's Dig. of Ev.*, arts. 67, 68; *Matteson v. Noyes*, 25 Ill. 591.

⁶⁸ *Reliance Lumber Co. v. West. U. Tel. Co.*, 58 Tex. 394, 44 Am. Rep. 620.

⁶⁹ *West. U. Tel. Co. v. Hopkins*, 49 Ind. 223.

⁷⁰ *Philipson v. Bates*, 2 Mo. 116, 22 Am. Dec. 444.

the original telegram which it receives and delivers, it seems that this would be the next best evidence.⁷¹ The office book of these companies is not, however, a shop book or an account book, or any record recognized by law as evidence, and where it only contains a memorandum of the terms of the original message, it can only be used to refresh the memory of the witness, where such usage is the practice. If a copy of the message is kept by authority of the company at either end of the line, or by a connecting company, it seems that it would be admissible as secondary evidence. A telegram written at one end of the line may be introduced as evidence at the other end, it seems, in two different ways: It may be introduced as the original, and when this is the case it must be proved to be the original;⁷² or, where the contents of the message delivered to the addressee are at issue,⁷³ it may be introduced as a fact relative to the fact in issue. It is part of the contract of transmission that the message will be transmitted and delivered in the exact words in which it was received from the sender; and when the issue arises on the incorrectness of the transmission, the original message must be introduced to prove such incorrectness. It was held in one case that on proof of the destruction of the original telegram, an uncertified copy was admissible on a trial of forgery to show that the respondent at a certain time knew of a material fact therein stated.⁷⁴ Where the issue is as to whether the message was ever delivered at all to the addressee, the receipt of the message by such person is the best evidence.

§ 690. Late improvements in telegraphy.

We do not think that the late improvements made in telegraphy will change the law heretofore discussed, in any particular, and especially do we think this is true with respect to the rules of evidence herein treated. Of course, in some instances the company will not be liable for errors made in the transmission by means of the late improvements, where it would otherwise be, should the message have

⁷¹ *Anglo-American Packing, etc., Co. v. Com.*, 31 Fed. 313; *Durkee v. Vt. C. R. Co.*, 29 Vt. 1277.

⁷³ *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712.

⁷⁴ *State v. Hopkins*, 50 Vt. 316.

⁷² *Barons v. Brown*, 25 Kan. 410; *Smith v. Easton*, 54 Md. 138.

been transmitted by the old method. What we mean is this: there is a very late invention on the method of transmitting news over telegraph lines, by means of which the sender, instead of the operator, virtually sends or transmits the message himself. In other words, he writes the message himself and, at the same time, by means of an electric connection of the pencil used by him with another at the receiving office, an exact copy is reproduced at the latter office. A still later improvement is where typewriters are connected instead of an electric connection. Now where these goods are in good working order, or when the company is not negligent in keeping them in suitable condition, it will not be liable for errors made in the transmission of news, when the sender voluntarily operates the machine himself. The wireless telegraphy is operated wholly by experienced employees of the company and the same liabilities are imposed on them for errors made as those imposed on the ordinary wire telegraph companies. A discussion of this subject may seem inappropriate at this place, but something was desired to be said about it and we decided it would be as well to speak here of it as in any other place.

§ 691. Same continued—secondary evidence.

With respect to the proof of the contents of telegrams sent by means of the wireless telegraph, the same rule of evidence is applicable as in the proof of telegrams sent by the ordinary telegraphic method. When it is sent by one of the other methods discussed in the preceding section, the original is the telegram written by the sender at the transmitting office, when the contents of the telegram delivered to the company are attempted to be shown. If this cannot, however, be produced, the next best evidence to prove such fact, as we believe, would be the reproduced copy at the other end of the line. If, however, it is required that a copy of the telegram be kept at the transmitting office, there is a doubt in our minds as to whether this or the reproduced copy at the other end of the line would be the best evidence; but we are inclined to think that if the contents of the telegram as delivered for transmission are at issue, the copy at the transmitting office would be the best evidence to prove such fact. In other respects, the admission of telegrams as evidence is the same as the admission of such as are sent in the ordinary ways, and which has already been discussed.

§ 692. Testimony of witnesses.

When the original cannot be produced, the addressee of the telegram may testify that it was received by him; however, if it is not shown by the admission of such person that he did receive it, such fact must be shown, either by his written receipt for the delivery—if he gave one—or by the oral testimony of some one present when it was delivered. But if there is proof that the message was properly placed upon the wires, and that the person to whom the message was sent was present at the place of destination, it has been held that a presumption of delivery then arises.⁷⁵ This presumption is not conclusive, however, but the burden is cast upon the plaintiff to show that it was not delivered to him. This may be proved by parties who were with him when he was in the office, and who could have seen the delivery if such had been made.

§ 693. Secondary evidence of unstamped contracts.

It has been held that if a written instrument which is the foundation of the action is not stamped, and is excluded as evidence for that reason, the contract evidenced by such written instrument cannot be proved by parol.⁷⁶ We presume the same rule would apply to actions upon which telegrams are the foundation. In an Alabama case it was held that the company would not be liable for negligently transmitting an unstamped telegram.⁷⁷ But if the telegram, not being the foundation of the action, is offered in evidence by a person not a party to it, as an admission of the adverse party touching a matter at issue, the fact that it is not stamped is no ground for objecting to its admission.⁷⁸ If suit is brought upon the original consideration for which an unstamped note is given, the note is admissible in evidence to explain the testimony of a witness in reference to the date of a settlement between the parties, and the amount found due,⁷⁹ and an unstamped telegram containing such facts may be ad-

⁷⁵ *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712; *U. S. v. Babcock*, 3 Dill. 571. See, also, *State v. Hopkins*, 50 Vt. 316; *Greenl. on Ev.* § 40.

⁷⁶ *Mobile, etc., R. Co. v. Edwards*, 46 Ala. 267.

⁷⁷ *West. U. Tel. Co. v. Young*, 36 So. 374.

⁷⁸ *Reis v. Hillman*, 25 Ohio St. 180.

⁷⁹ *Israel v. Redding*, 40 Ill. 362.

mitted to prove such. This discussion is of little importance just now, as the revenue stamp law has been repealed.⁸⁰

§ 694. When telegram need not be produced.

Where a written instrument is only an evidence of a fact in issue, it need not be produced, nor need its absence be satisfactorily accounted for before other evidence of that fact is admissible.⁸¹ Thus, a payment of money may be proved by oral testimony, without accounting for the absence of the written receipt.⁸² Applying this rule to telegraphic messages, it follows that when the message is merely an evidence of a fact in issue, it need not be produced nor its absence accounted for, before oral testimony may be admitted to prove such fact. Thus, as has been seen, the contents of the telegram delivered to the company for transmission, may be proved by oral testimony only when its absence has been satisfactorily accounted for, yet the absence of such message need not be satisfactorily accounted for before the introduction of oral testimony of the genuineness or authorization of the sender. So, the delivery of a telegram to the person addressed may be proved orally without accounting for the written receipt for that delivery. So, also, where the action is for a delay in the delivery of a message, oral testimony may be introduced to show such delay, without accounting for the message actually delivered, and upon which is noted the exact time of delivery.⁸³ When a telegram has been altered in transmission, whereby the sender suffers an injury, he may prove by oral testimony that the authorized

⁸⁰ Act of Congress, June 13, 1898, and 1901.

⁸¹ Greenl. on Ev., § 90; Taylor on Ev. (7 Ed.), §§ 415, 416.

⁸² *Jacobs v. Lindsey*, 1 East. 460.

⁸³ Where the telegram is not itself the foundation of the action, but the failure to transmit and deliver it within a reasonable time is the gist of the controversy, the fact that the message was delivered for transmission is a substantive fact necessary to be proved, and the last rule does not apply, and parol evidence is not secon-

dary but primary: *West. U. Tel. Co. v. Cline*, 8 Ind. App. 364, 35 N. E. 564. Where copies of telegrams relating to a matter about which there is no controversy have been filed on a notice, it is proper to permit the operator who received the telegram to state them, when such statement does not materially differ from the copies filed. *International, etc., R. Co. v. Prince*, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795; *International, etc., R. Co. v. Cock*, 14 S. W. (Tex.) 242.

message was not delivered without accounting for the message as delivered, but if the addressee should institute the action for injuries sustained by acting on a misinformation, he should produce the altered message, or give good reasons for its absence.⁸⁴

§ 695. Declaration of employees subsequently employed.

The general rule of agency is, that the representations and admissions of agents bind the principal only when they are made while the agent is acting within the actual or apparent scope of his authority.⁸⁵ It is also well settled that the declarations concerning a fact in dispute are admissible as part of the *res gestae* only when they explain and are contemporaneous with such fact and are made without any preparation.⁸⁶ In accordance with this rule, where a telegraph company is being sued for a breach of contract, the subsequent acts and declarations of the company's agent, unconnected with the performance of the contract, are not admissible.

§ 696. Notice by telegram.

Where a statute requires notice to be given in writing, it has been held that such notice, sent by means of a telegram, was a sufficient

⁸⁴ Gray on Tel., § 134. The author gives the following for the reason of the rule: "The delivery of an altered message by a telegraph company causes at times two distinctly different losses. It injures the sender, in depriving him of the benefit that he would have derived through the due and correct communication of his message; it injures the receiver, in causing him to act to his detriment upon an altered message. In an action for the former injury, the fact that the authorized message was not delivered may be proved by oral testimony, without accounting for the absence of the delivered message, showing the exact alteration. In an action for the latter injury, however, the delivered message must be pro-

duced or its absence satisfactorily accounted for before oral testimony is admissible. This distinction is due to the following cause: In the former action, the question in issue is whether the correct message was delivered; in the latter, what was the correct message delivered. In the former, the contents of the delivered message, whatever they may be, are simply evidence that the correct message was not delivered; in the latter, they are themselves to be proved, since the action is based upon the exact difference between the contents of the message delivered and those of the message authorized."

⁸⁵ Story on Agency, §§ 134-137.

⁸⁶ Best on Ev. (7 Ed.), § 495.

compliance with such statute.⁸⁷ Thus, where the clerk adjourns court in accordance to an order, sent by means of a telegram, it may be held a sufficient compliance with a statute requiring notice to be in writing.⁸⁸ But a notice conveyed by means of a telephone is a verbal one and is, therefore, insufficient under a statute requiring notice to be in writing.⁸⁹ This is the holding both in the state and federal courts, and is also the ruling in the English courts.⁹⁰

§ 697. Telephone communication as evidence.

Conversations carried on by means of a telephone do not differ in their essential characteristics from those carried on verbally.⁹¹ The only apparent difference is, that the parties conversing are further apart; there is generally no difference in the tone of their voices. The telephone is merely a medium by which they are brought together in voice, although far apart in person. The rule of evidence with respect to the admission of oral statements made in an ordinary conversation is generally applicable to conversations of this nature.⁹² Thus, an acknowledgment of a deed made to a notary over a telephone was held valid, the identity of the party making the ac-

⁸⁷ *Georgia*.—*West. U. Tel. Co. v. Bailey*, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933n (notice of writ of *certiorari*).

Illinois.—*Morgan v. People*, 59 Ill. 58.

Indiana.—*Kaufman v. Wilson*, 29 Ind. 504.

Iowa.—*State v. Holmes*, 56 Iowa 588, 9 N. W. 894, 41 Am. Rep. 121.

New Jersey.—*Cape May, etc., R. Co. v. Johnson*, 35 N. J. Eq. 422.

United States.—*Schofield v. Horse Spring Cattle Co.*, 65 Fed. 433.

England.—*Haywood v. Wait*, 18 W. R. 205; *Tomkinson v. Cartledge*, 22 Alb. L. J. 1231; *In re Bryant*, 4 Ch. D. 98, 35 L. 7 U. S. 489, 25 W. R. 230; *Ex. p. Langley*, 13 Ch. D. 110, 28 W. R. 174.

⁸⁸ *State v. Holmes*, 56 Iowa 588, 9 N. W. 894, 41 Am. Rep. 121.

⁸⁹ *Schofield v. Horse Spring Cattle Co.*, 65 Fed. 433, testing stat., § 672. U. S. Rev.

⁹⁰ *Ex parte Apelir*, 35 S. Car. 417; *South Carolina Code of Civil Procedure*, § 408; *Schofield v. Horse Spring Cattle Co.*, 65 Fed. 433.

⁹¹ *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988.

⁹² *Globe Printing Co. v. State*, 23 Mo. App. 451; *People v. Ward*, 3 N. Y. Crim. 483; *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988; *Shawyer v. Chamberlin*, 113 Iowa 742, 84 N. W. 661, 86 Am. St. Rep. 41. See, also, *Galt v. Woliver*, 103 Ill. App. 71; *Damenville v. Leonard*, 8 Ohio Civ. Dec. 735, 15 Ohio Civ. Ct. 686; *Southwork Nat. Bank v. Smith*, 21 Pa. Co. Ct. 1, 7 Pa. Dist. 182.

knowledge being clear.⁹³ In a criminal case, where a witness testifies that he called up a certain person over the telephone and recognized his voice in talking to him, he may give in evidence the communication which the other party made to him.⁹⁴

§ 698. Identity of person.

In order for the rule to hold good, the identity of the person must be shown by the party offering to produce such communication as evidence. This may be done by direct or circumstantial evidence, and it is not necessary that the voice of either person be recognized, but if the identity of the person conversing be shown, this will be sufficient.⁹⁵ The identity of the person may be shown by a person who had a previous conversation with the defendant in a similar manner;⁹⁶ but the plaintiff cannot, in support of his statement of

⁹³ *Banning v. Banning*, 80 Cal. 271, 22 Pac. 210, 13 Am. St. Rep. 156.

⁹⁴ *People v. Ward*, 3 N. Y. Crim. 483; *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 942, 63 L. R. A. 988. See note 92 for further cases.

⁹⁵ In *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 99 Am. St. Rep. 945, 63 L. R. A. 988. The court said: "When material to the issue, communication through the medium of the telephone may be shown in the same manner, and with like effect as conversations had between individuals face to face, but the identity of the party sought to be charged with a liability must be established by some testimony, either direct or circumstantial. It is not always necessary that the voice of the party answering, or of either party, for that matter, be recognized by the other in such conversations, but the identity of the person or persons holding the conversation, in order to fix a liability upon them or their principals, must in some manner be shown. To hold parties responsible for answers made by unidentified per-

sons in response to call at the telephone from their offices or places of business concerning their affairs, opens the door for fraud and imposition, and establishes a dangerous precedent, which is not sanctioned by any rule of law or principle of ethics of which we are aware. A party relying or acting upon a communication of that character takes the risk of establishing, the identity of the person conversing with him at the other end of the line."

⁹⁶ In the case of *Globe Print. Co. v. Stahl*, 23 Mo. App. 451, the court said: "The sole question which arises upon the record is whether the court erred in admitting evidence of a conversation heard through a telephone between the plaintiff's bookkeeper and a person who answers to the defendant's name. The bookkeeper testifies that he called up by telephone to the general office of the Bell Telephone Company for the defendant's number, and was, by the central office, connected therewith; that the list of the telephone company showed that the defendant had two telephones, one at his undertaking establishment on

such conversation, prove that he repeated at the time to a third person the answer received over a telephone.⁹⁷ It is true that a party may be misled by a conversation over a telephone. The acts and expressions of the person talking may be often followed in ascertaining what he means, and this, of course, cannot be considered while communicating by means of the telephone. But, in an ordinary and natural conversation, the identity of the person may be established by means of hearing such person talk, or other circumstances, quite as readily though possibly not as certainly as if he had seen such person.⁹⁸ The fact that the witness, who testifies to a conversation between himself and another, did not recognize the other's voice does not affect the admissibility of his evidence but only its weight.⁹⁹ The same rule applies to a case where the witness, in an action against a carrier, testifies that he demanded the goods in question from the defendant's agent, through the telephone, but that he

Franklin avenue, in the city of St. Louis, and the other at his livery stable, on Olive street; that witness was not certain which number he called, but that his best recollection was that it was the Olive street number; that there was an answer from the defendant's number, to the telephone call; that he (the witness) did not know whose voice it was, and does not know; that the witness did not know the defendant's voice and did not know the defendant, but that he asked, through the telephone, if that was Stahl (the defendant) and the answer was 'Yes.' The witness was then asked to give the conversation then had through the telephone with the party answering the call. In response to this question the witness testified, against the objection of the defendant, 'that he asked why defendant did not pay the bill for which this suit was brought, and that the party answering said, "All right; I will attend to the matter about the first of the month."' A previous witness had tes-

tified for the plaintiff to a conversation through the telephone in a similar manner with the defendant, whose voice the former witness identified. The court ruled that the testimony was admissible.

⁹⁷ *German Savings Bank v. Citizens' Nat. Bank*, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399. See, also, *Missouri Pac. R. Co. v. Heibenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861; *Cent. U. Tel. Co. v. Falley*, 118 Ind. 194, 10 Am. St. Rep. 135.

⁹⁸ *Shawyer v. Chamberlain*, 113 Iowa 742, 84 N. W. 661, 86 Am. St. Rep. 411; *Wolf v. Missouri Pac. R. Co.*, 97 Mo. 473, 3 L. R. A. 539, 10 Am. St. Rep. 331, 11 S. W. 718; *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901. See *German Savings Bank v. Citizens' Nat. Bank*, 101 Iowa 530, 63 Am. St. Rep. 399, 70 N. W. 769.

⁹⁹ *Wolf v. Missouri Pac. R. Co.*, 97 Mo. 473, 3 L. R. A. 539, 10 Am. St. Rep. 331; *Globe Print. Co. v. Stahl*, 23 Mo. App. 451.

did not remember the name of the agent on whom he made the demand;¹⁰⁰ or, at which office, where the defendant had two, he had called.¹⁰¹

§ 699. When operator converses.

Where two parties desire to communicate by means of a telephone, but on account of inexperience in the use of a 'phone, or on account of atmospheric hindrance, one of them is unable to carry on his part of the conversation, whereby an operator in the employ of the company at the other end of the line is called on to carry on the conversation, he is deemed the agent of the party who invokes his aid and is competent to prove the message or conversation by his principal.¹⁰² If such operator has forgotten what was said in the conversation, it may be proved by witnesses who heard him when the statements were made to the party for whom he was conversing.¹⁰³ It seems that the identity of the person at the other end of the line may be proven by such operator whether he was acting as agent in such

¹⁰⁰ *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861. See, also, *Rock Island, etc., R. Co. v. Potter*, 36 Ill. App. 590.

¹⁰¹ *Globe Print. Co. v. Stahl*, 23 Mo. App. 451.

¹⁰² *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901. In this case the parties did not have a conversation directly with each other over the telephone, but the conversation was conducted by an operator in charge of a public telephone station at one end of the line. It was held that the conversation was admissible in evidence and that it was competent for the person receiving the message to state what the operator at the time reported as being said by the sender. The court in the opinion says: "When using the telephone, if he knows that he is talking to the operator, he also knows that he is making him an agent to repeat what he is saying to another party; and, in such a case, certainly the

statements of the operator are competent, being the declarations of the agent, and made during the progress of the transaction. If he is ignorant whether he is talking to the person with whom he wishes to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information was intended it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he might have said. This certainly should be the rule as to an operator, because the person using the telephone knows there is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence."

¹⁰³ *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901.

conversation, or whether his voice was recognized in a casual way, while such person was conversing with the party at the place at which the operator was stationed.

§ 700. Operator as interpreter.

It is a general rule that where one, through an interpreter, makes statements to another, the interpreter's statements, made at the time, of what was said, are competent evidence against the party. The interpreter need not be called to prove it, but his statements made at the time may be proved by third persons who were present and heard it.¹⁰⁴ The reason of the rule is, that the interpreter is the agent of both parties and acting at the time within the scope of his authority. So, it has been held that when an operator at some intermediate point on the line volunteers to aid and assist two parties to converse over the line where they are prevented from talking themselves, each to each, by atmospheric hindrances, such operator, acts in the capacity of interpreter or as the agent for both parties, and statements made by one of such parties to such operator may be used against the other.¹⁰⁵ Such statements are not given as hearsay evidence, but are competent because it is the declaration of an agent made during the progress of a transaction in which he represents his principal.¹⁰⁶

§ 701. Oaths admissible by means of telephone.

Conversations can be carried on by means of the telephone almost as easily as if the parties were together, face to face. Of course, there may be some hindrances to prevent this, but as a usual thing, where the lines are in good working order, communication can be as easily effected by this means as by personal conversation; and where the identity of either or both of the parties is known, there is no reason why the same business and legal transactions—where it is not necessary for the same to be in writing—may not be conducted by this means as easily as if the parties were together in person. For in-

¹⁰⁴ *Camerlin v. Palmer Co.*, 10 Allen 539; *Schearer v. Harber*, 36 Ind. 536; 1 Greenl. Ev., § 183; 1 Phill. Ev. 519.

N. W. 718, 37 Am. St. Rep. 428, 17 L. R. A. 440n.

¹⁰⁶ *Id.*

¹⁰⁵ *Oskamp v. Gadsen*, 35 Neb. 7, 52

stance, in cities and towns, as is known, orders, sales, purchases and many other small business transactions are made almost exclusively by the telephone. Orders of the court—where the same is not to be in writing—may be made through this means. We see no reason why an oath may not be administered by means of the telephone, where the identity of the party making same is known; and it has been held that an acknowledgment of a deed made to a notary over a telephone was valid, when the identity of the party making the acknowledgment was clear.¹⁰⁷ If, however, it should be necessary for the party to attach his signature to the instrument of writing, at the time the acknowledgment should be administered, the rule would be otherwise.

¹⁰⁷*Banning v. Banning*, 80 Cal. 271, 22 Pac. 210, 13 Am. St. Rep. 156. The act of an officer in taking acknowledgments is judicial in its character, and therefore cannot be impleaded collaterally: *Murrell v. Diggs*, 84 Va. 900, 6 S. E. 461, 10 Am. St. Rep. 893.

A certain justice of the peace in Ohio having learned that a farmer had been in town drunk, and after prepar-

ing an affidavit against the farmer for said drunkenness telephoned him of such affidavit. The farmer plead guilty over the telephone to the justice of the peace and then a fine was imposed on him, he afterwards having remitted the fine by mail. We think that justice was properly carried out in this proceeding.

CHAPTER XXIX.

TELEGRAPH MESSAGES IN RELATION TO THE STATUTE OF FRAUDS.

§ 702. Evidence.

703. Subject matter to which statute applies.

704. How statute may be satisfied.

705. Company—agent of sender.

706. Message delivered to company—effect of under statute of frauds.

707. Telegram delivered to addressee—effect under statute.

708. What telegram should contain.

709. Time of delivery with respect to making of contracts.

710. Written contracts adopted.

§ 702. Evidence.

It is not the intention to give the history of the statute of frauds, or to discuss the laws in general applicable, thereto, as this is a subject foreign to his work, but to discuss only telegraphic messages as evidence, in relation to such statutes. The English statutes of frauds was enacted in 1676, under the title, "An act for preventing of Frauds and Perjuries,"¹ and has been adopted, in substance, in most if not all the American states. The fourth and seventeenth sections of this statute affect contracts of sale, the former applying to "lands, tenements, and hereditiments, or any interest in or concerning them," and the latter to the sale of personal property; or, in the language of the English statute, "any goods, wares, or merchandise, for the price of ten pounds sterling or upwards." It is these two sections which are of special importance in connection with telegraph messages.²

¹ 29 Car. Q. C. 3.

² The English Statute of Frauds and Perjuries, 29 Car. 11. c. 3. whose provisions have generally been adopted in the United States, contains two sections—the fourth and seventeenth—of especial importance in connection with telegraph messages. The fourth section provides, in effect, that no action shall

be brought to charge an executor or administrator upon any special promise to answer out of his own estate; or to charge the defendant upon any special promise to answer for the debts, defaults, or miscarriage of another; or to charge any person upon an agreement made in consideration of marriage; or upon any contract or

§ 703. Subject matter to which statute applies.

Prior to the enactment of the statute of frauds, all freehold estates in corporeal hereditament could be created by livery of seizin, and all estates less than freehold by parol. The statute changed the law so that all such freehold estates created merely by livery of seizin, and all estates less than freehold (except leases for terms not exceeding three years whereon a rent of not less than two-thirds the full improved value was reserved, created merely by parol, have the effect only of estates at will, unless they are put in writing and signed by the grantor. The written instrument required by the statute must be a deed in the case of a freehold estate,³ but in the case of estates less than freehold, the instrument need not be made under seal;⁴ and a written agreement for a lease signed but not sealed has been held to amount to a lease unless it is otherwise intended by the parties.⁵ Where the subject-matter is concerning "goods, wares, or merchandise," a contract made in regard to same, "shall not be allowed to be good" except upon one of three conditions, namely: (1) The buyer shall accept part of the goods so sold, and actually receive the same; (2) or give something in earnest to bind the bargain, or in part payment; (3) or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.⁶

sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. The seventeenth section enacts, in effect, that no contract for the sale of any goods, wares, or merchandise, for the price of ten pounds sterling, or upwards, shall be allowed to be good unless, among other exceptions, some note or memorandum in writing of the

said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.

³ *Jackson v. Wood*, 12 Johns (N. Y.) 73; *Stewart v. Clark*, 13 Mete. (Mass.) 79. Some of the states have abolished the requirement of a seal.

⁴ *Lake v. Campbell*, 18 Ill. 106; *Mayberry v. Johnson*, 3 Greene (N. J.) 116; *Hill v. Woodman*, 14 Me. 38; *Allen v. Jaquish*, 21 Wend. (N. Y.) 628.

⁵ *Baxter v. Brown*, 2 W. Bl. 973; *Goodlittle v. Way*, 17 R. 735. See also, *Harrison v. Parmer*, 76 Ala. 157.

⁶ *Langdell's Select Cases on Sales*, 1032-33.

§ 704. How statute may be satisfied.

The statute may be satisfied either by a written contract or by a sufficient memorandum evidencing the existence of an antecedent parol contract. There is a distinction between the contract itself and the "note or memorandum" evidencing its existence, and it is only when the contract is oral that it is necessary that there be a written memorandum. When the contract is oral and is to be evidenced by a memorandum, the latter must contain all the material and express terms of the contract, and must be signed by the party to be charged, or by a person or agent thereunto lawfully authorized by him.⁷

§ 705. Company—agent of sender.

With reference to contracts entered into by an agent, the principal will be bound by any act made within the apparent limit of the agent's authority, without regard to the violation of any instructions, private in their nature, which the principal may have given the agent as to the manner of executing his authority. Such is the undoubted rule, and is sustained by almost all the authorities.⁸ The principal is bound by all the agent's acts. So, with respect to the making of a contract for said principal, all acts done in his behalf will be charged to the principal. It has been seen heretofore that contracts may be made between two persons by the medium of the telegraph, and while the telegraph company may be considered, in a certain light, an independent contractor with respect to said contract, yet it is very generally held that it acts as agent for the party employing its services, or the one suggesting these means to consummate such contract. Therefore, this being the general rule, any act of the company in carrying out such contract will be binding on the sender or the company's principal.

⁷ Langdell's Select Cases on Sales, 1032-33.

⁸ Louisville Coffin Co. v. Stokes, 78 Ala. 372; Liddell v. Sohline, 55 Ark. 627, 17 S. W. 705; Hamill v. Ashley, 11 Colo. 180, 17 Pac. 502; Paine v. Tillinghost, 52 Conn. 532; Lattomus v. Farmers Mut. F. Ins. Co., 3 Houst. 404; Lake Shore, etc., R. Co. v. Foster,

104 Ind. 293, 54 Am. Rep. 319, 4 N. E. 20; Austrian v. Springer, 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. Rep. 50; Potter v. Springfield Milling Co., 75 Miss. 532, 25 So. 259; Gerhard v. Boatman's Sav. Inst., 38 Mo. 60, 90 Am. Dec. 407; Whiley v. Dumeau, 47 S. C. 139, 25 S. E. Rep. 54.

§ 706. Message delivered to company—effect of under statute of frauds.

While an oral message may be delivered to a company to be transmitted and delivered, yet the general regulations of these companies require the message to be written and signed. Such regulations, as has been seen, are reasonable and enforceable. The question which presents itself under this subject is, Whether a written message, concerning a contract and containing all the material and express terms of the contract, is a sufficient memorandum, when delivered to the company for transmission, to satisfy the statute of frauds? It has been so held.⁹ A memorandum is in the nature of an admission by the party to be charged, and it is not necessary, therefore, for it to be delivered to the other party in order for the contract to become effective.¹⁰ The fact that the telegram is written in accordance to the regulations of the company, does not affect its validity as a memorandum. The act of employing the company and, consequently, the act of writing the message in compliance with the regulation of the company, is a voluntary act,¹¹ and is not an act done under duress.

§ 707. Telegram delivered to addressee—effect under statute.

The next question which presents itself in considering this subject is, Whether a telegram delivered by the company to the ad-

⁹ *McBlain v. Cross*, 25 L. T. U. S. 804; *Trevor v. Wood*, 36 N. Y. 307; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 358; *Watson v. Baker*, 71 Tex. 739; *Little v. Dougherty*, 11 Colo. 103; *Ex. p. Brown*, 7 Mo. App. 487. In the case of *McBain v. Cross*, above cited, B. having contracted with C., defendant's brother, for the sale of hay, brought an action against defendant for not accepting. At the trial the judge admitted letters and telegrams signed by C. as evidence against defendant, and the jury found for plaintiff. Held, that there was sufficient evidence of the authority, and that the two telegrams, of which one was signed in C.'s name, and in the other the name of the defendant was not mentioned as buyer,

together constituted a sufficient memorandum of the contract to satisfy the Statute of Frauds, on the ground that the defendant be treated as the undisclosed principal of C., who appeared on the telegrams to be liable as principal.

So, also, a telegram sent in pursuance of a previous correspondence by letter, may constitute "an unconditional promise in writing to accept a bill before it is drawn," and amounts to an actual acceptance under the statute, so as to preclude the necessity of presentment for acceptance or payment. *Whilden v. Merchants', etc., Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1.

¹⁰ *Brown on Statute of Frauds*, § 354a.

¹¹ *Brown ex. p.*, 7 Mo. App. 484.

dressee satisfies the statute, if it contains the material and express terms of the contract and the signature of the sender—the party to be charged—written by the company? If the telegraph company is the agent of the sender, which may be the case, as stated in a preceding section and which will be further considered, a delivery of such telegram by it will be a sufficient compliance with the statute. But, on the other hand, if the company is not operating in the capacity of agent for the sender, the rule would be otherwise. It is presumed that a telegraph company has written out the telegram at the place to which it was delivered in the exact words in which it was delivered to such company for transmission, and when the latter is deemed the agent of the sender in delivering any, as distinguished from certain, messages, the message delivered, if it contain the material and express terms of the contract, will satisfy the statute, although the message has been altered in its transmission. But if the company is only representing the sender as agent in delivering the message which it receives from him, the statute will be satisfied so long as the message has not been altered, or when it conforms to the message which the company received. We shall hereafter speak more fully of contracts made through the medium of the telegraph, and how the statute of frauds is affected thereby.

§ 708. What telegram should contain.

Whether or not a telegram, delivered to or by a telegraph company, contains sufficient memoranda of a contract to satisfy the statute of frauds, must be determined by the law applicable to the subject in general. Thus, generally speaking, the memorandum should contain, in substance, all the material parts of the contract, including the names, or a description, of both parties;¹² the subject-matter, which must be correctly stated;¹³ the price, if actually agreed upon by the

¹² *Cooper v. Smith*, 15 East, 103; *Allen v. Bennett*, 3 Faunt, 169; *Lincoln v. Erie Preserving Co.*, 132 Mass, 129; *McElroy v. Levey*, 61 Md. 397; *Anderson v. Harold*, 10 Ohio 399.

¹³ *Hazard v. Day*, 14 Allen (Mass.) 487, 92 Am. Dec. 790; *May v. Ward*, 134 Mass, 127; *McElroy v. Buck*, 35 Mich. 434.

A defective memorandum of sale cannot be helped out by a telegram from one of the parties with which the other is in no wise connected. *J. K. Armsby Co. v. Eckerly*, 42 Mo. App. 299.

So, also, telegrams between a sheriff and a third person are inadmissible to show an agreement between a sher-

parties;¹⁴ the stipulations as to credit, and the time and place of payment, if such there be;¹⁵ and any other terms and conditions which are a part of the contract.¹⁶ In accordance with this rule, a telegram properly addressed and signed, in the following words, "You may come on at once at a salary of two thousand dollars, conditional only upon satisfactory discharge of business," was held to be insufficient as a memorandum to satisfy the statute, since it fixed no time for the continuance of the employment and did not even mention the nature of the employment itself.¹⁷ Telegrams which are signed by a person and relate to a contract but do not state its terms or conditions, are not sufficient to take the contract out of the statute, and a defective memorandum of sale cannot be helped out by a telegram from one of the parties with which the other is in nowise connected. So, also, telegrams between a sheriff and a third person are inadmissible to show an agreement between a sheriff and a county in relation to the subject-matter; and telegrams concerning the sale of property are not a sufficient memorandum under the statute, where it is impossible to tell from them exactly what property is intended to be included, and the parties disagree as to what property is meant.

§ 709. Time of delivery with respect to making of contracts.

It is not essential that the memorandum should be made at the same time as the contract;¹⁸ nor is it necessary that all the terms of the contract should be noted at one time, or in one piece of paper; but it will suffice if the whole contract be in substance contained on separate pieces, and these memoranda make such reference to each other as to show that they are parts of one whole.¹⁹ So, applying

iff and a county in relation to their subject-matter. *Yavapie County v. O'Niel*, 29 Pac. Rep. (Ari.) 430.

Telegrams concerning the sale of property are not sufficient memorandum under the statute, where it is impossible to tell from them exactly what property is intended to be included and the parties disagree as to what property is meant. *Beckenridge v. Crocket*, 78 Cal. 529.

¹⁴ *Smith v. Arnold*, 5 Mason 416; *Phelps v. Stillings*, 6 N. H. 505; *Soles*

v. Hickman, 20 Pa. St. 180; *O'Niel v. Crane*, 67 Mo. 250.

¹⁵ *Wright v. Weeks*, 25 N. Y. 158; *Norris v. Blair*, 39 Ind. 90; *Williams v. Robinson*, 73 Me. 186.

¹⁶ *Riley v. Farnsworth*, 116 Mass. 223; *Oakman v. Rogers*, 120 Mass. 214.

¹⁷ *Palmer v. M. P. Rolling Mill Co.*, 32 Mich. 274.

¹⁸ *Bird v. Munroe*, 66 Me. 347.

¹⁹ *Peck v. Vandemark*, 99 N. Y. 29; *Jelks v. Barrett*, 52 Miss. 315; *Fisher v. Kuhn*, 54 Miss. 480.

the rule to telegrams, it is not necessary that they be delivered at the time the contract was made; nor is it necessary that all of the facts should be embraced in one message, but if they are made out properly on different telegraph blanks and signed by the sender, it is a sufficient compliance with the statute.

§ 710. Written contracts adopted.

The statute of frauds is not affected by the parties mutually accepting a written contract, as this is considered, under such statute, a contract in writing. Such contract cannot be varied by oral testimony, unless it was created by both written and oral communication. In the latter instance, it is clear that the parties did not intend to create the contract by their mutual adoption.²⁰ and, in such cases, oral testimony should be admissible to prove the intent of the parties. In accordance with this rule, oral testimony of the terms of a contract to let a canal boat was admitted, although the message which finally completed the contract was in the following words: "You may have barge Globe for \$400, until October 1. Rent payable half 1st July, and half 1st October."²¹ A message of this description is not sufficient as a memorandum to satisfy the statute and does not contain the terms of the oral contract; and oral testimony should be admissible in such instances to show the meaning of the written communication.²²

²⁰ *Beach v. R. & D. B. Rd. Co.*, 37 N. Y. 457.

²¹ *Beach v. R. & D. B. Rd. Co.*, 37 N. Y. 457.

²² *McElroy v. Buck*, 35 Mich. 434.

CHAPTER XXX.

TELEGRAPH MESSAGES AS PRIVILEGED COMMUNICATIONS.

§ 711. Introduction.

- 712. Same continued—in hands of telegraph companies.
- 713. Postal law not applicable to telegraph messages.
- 714. Same continued—would assist in illegal purposes.
- 715. Statutes forbidding disclosure of telegrams.
- 716. Same continued—not protected by postal laws.
- 717. When may be privileged communications.
- 718. Steps to obtain telegrams—in general.
- 719. Same continued—how further obtained—court inspection.
- 720. Rule for describing message in writ.
- 721. Same continued—illustrations—valid services.
- 722. Same continued—when invalid.

§ 711. Introduction.

Having treated, in preceding chapters, of the manner of proving the contents of a telegraphic message, and when such satisfies the statute of Frauds, we shall now speak of such as privileged communications. In discussing the subject, we shall attempt to treat it under two different views with respect to the person from whom a divulgence of the message is sought; that is, whether the message is in the hands of the sender or addressee, or whether it is in the hands of the company. With respect to the first of these—whether a message in the hands of the sender or addressee is privileged communication—we shall be very brief, since this question depends entirely upon the laws relating to privileged communications in general, and the fact that the communication was made by telegraph instead of some other way, does not change the rule. The mode of communication has never been held to determine the question of privilege.

§ 712. Same continued—in hands of telegraph companies.

It has been a very mooted question whether a message in the hands of the telegraph company was a privileged communication. It was held in England, before the government got control of these compan-

ies, that it was not;¹ since that time, the earlier cases held that they were privileged communications,² but the latter decisions hold them not to be privileged.³ This question has been more thoroughly discussed in the courts of our country, and it has been very generally held that such communications were not privileged. Those who urge that the messages, in the hands of the telegraph company, are privileged communications, do not attempt to support their reasons upon the relationship of the parties, or the subject-matter of the messages, or upon the confidential nature of the communication. They base their reasons either upon the ground of public policy which sustain those legal statutes of the United States, which in effect, give inviolability to postal communications, or upon particular statutes giving inviolability to telegraph messages in the hands of telegraph companies. We shall treat these briefly in separate sections.

§ 713. Postal law not applicable to telegraph messages.

Able writers have taken the position that the law which protects the contents of communications made through the United States mail should apply to communications made by the medium of telegraphy, as the communications made by the latter means were often as great in importance as those sent by mail.⁴ Granting this to be the case,

¹ The Coventry Case, 1 O'M. & H. 97, 104; The Bridgewater Case, 1 O'M. & H. 112.

² The Tamston Case, 2 O'M. & H. 66; The Stroud Case, 2 O'M. & H. 107, 110.

³ The Bolton Case, 2 O'M. & H. 138; The Horwich Case, 3 O'M. & H. 61, 62; Tomline & Tyler, 44 L. T. N. S. 187.

⁴ In 18 Am. L. Reg. 65, *et seq.*, Mr. Cooley discusses the subject and contends for a rule opposed to that of the text. He announces, in conclusion, that the doctrine that telegraph authorities may be required by legal process to produce private messages upon the application of third persons, is objected to on the following grounds:

"1. That it defeats the policy of the law, which invites free communication, and to the extent that it may discourage correspondence, it operates as a restraint upon industry and enterprise, and, what is equal importance, upon intimate social and family correspondence.

"2. It violates the confidence which the law undertakes to render secure, and makes the promise of the law a deception.

"3. It seeks to reach a species of evidence which, from the very course of the business, parties are interested to render blind and misleading, and which, therefore, must often present us with error in the guise of truth, under circumstances which precludes a discovery of the deception.

it is a question to be settled by the legislative and not by the judicial branch of the government.⁵ As seen, the government has control of the postal system, and, for this reason, it has legislated upon the subject, and it is not, therefore, an assumption of a legislative power for the courts to consider questions arising under this subject; but it would be if they should consider a subject not embraced in the postal laws. There is also a difference in the amount of information derived from the communications sent by these two instrumentalities of news communicators, and this should be a reason for not permitting communications sent by telegraph to be protected by the postal laws. All the information obtained from the contents of a communication sent by mail, is such as may be seen from the wrapper or envelope, while, on the other hand, a telegraph company acquires full knowledge of the contents of messages entrusted to it for transmission. If a court desires to obtain information of certain communications sent by telegraph, it may secure this from the company without exposing other communications, but the same information could not be obtained from the United States mail without divulging, perhaps, many other communications whose secrecy, immaterial for any purposes of justice, might be of the utmost importance to the parties.

§ 714. Same continued—would assist in illegal purposes.

As we all know, and as it has often been stated at other places in this work, telegraph companies have become great factors in the commercial world, and the news transmitted by means of those instrumentalities concern matters of almost every description. It is the quickest way of accomplishing business transactions at distant points.

⁵ In *Ex. p. Brown*, 72 Mo. 91, 37 Am. Rep. 426, the court said: "The fact that railroad trains orders are generally communicated by telegraph, that a vast amount of trade and traffic is transacted through this medium, that it has become of almost equal importance in the commerce of this country with the postal system, and that in a business sense men are compelled to communicate by telegraph, are for the

consideration of the legislative branch of the government in determining the propriety of placing telegraph communications on the same footing with correspondence by mail, or declaring them privileged; but the announcement of such a doctrine by the court would be an assumption of power which belongs to the legislative department."

If, then, communications sent by means of telegraphy were allowed to be privileged communications, many criminal acts would be consummated by means of these companies. The criminal would communicate the news concerning his crime, knowing at the time that the company could not divulge the same.⁶ Of course, the company could refuse, as has been seen, to transmit news concerning illegal purposes, but it is not every time that the company knows of the illegal nature of the communication. While the same criminal object may be accomplished by communications through the mail, yet other secrets and communications would be divulged, as stated elsewhere, if the courts should attempt to obtain the information concerning this particular charge from mail matters. This view, however, has been assailed by Mr. Cooley in a very able discussion on the subject.⁷

§ 715. Statutes forbidding disclosure of telegrams.

There are statutes in some of the states which forbid, under penalty, the disclosure of telegrams by telegraph companies.⁸ It seems, however, from a perusal of most of the statutes on this subject, that there are few which prohibit the disclosure of the contents of tele-

⁶ In *State v. Litchfield*, 58 Me. 269, the court, said: "Nor can telegraphic communications be deemed any more confidential than any other communications. They are not to be protected to aid the robber or assassin in the consummation of their felonies, or to facilitate their escape after the crime has been committed. Telegraphic companies cannot rightfully claim that the messages of rogues and criminals, which they may innocently or ignorantly transmit, should be withheld whenever the cause of justice renders their production necessary."

In *Hemisler v. Friedman*, 2 Pars. Sel. Cas. (Pa.) 274, it is said in ordering the production of a telegram: "The telegraph may be used with the most absolute security for purposes dis-

tructive to the well-being of society, a state of things rendering its usefulness at least questionable. The correspondence of the traitor, the murderer, the robber, and the swindler, by means of which their crimes and frauds could be the more readily accomplished and their detection and punishment avoided, would become things so sacred that they could never become accessible to public justice, however deep might be the public interest involved in their production."

⁷ 18 Am. L. Reg. 72.

⁸ Code of Tenn. § 1501-2; Code of Miss. (1892) § 1301; Laws of Nor. Car. (1889) Ch. 41, p. 61; Public Acts Conn. (1889) Ch. 30, p. 18; Wisconsin Rev. Stat. § 4557; Iowa Code § 1328.

grams while in the hands of the telegraph company. While there is a difference between some of these statutes, yet there is a similarity in them all; and, for the reason that there is a difference in some of them in some respect, it would be difficult to lay down a rule which would be applicable to all. So, we would therefore suggest that the statute under which the cause arises be consulted. In some of these the provision of the statute is against a disclosure of the contents of such telegrams, except to a court of justice. In a great number of them the provision is against a willful or intentional or an unlawful disclosure of the contents of such telegrams, and the penalty is generally imposed on the person and not the company making the disclosure. In others, the provision stands unqualified. It will be seen from a further perusal of these statutes that none of the provisions therein prohibit the company from disclosing the contents of such telegrams when legally summoned for that purpose into a court of justice. The first-mentioned statutes provided that they should not be disclosed except to a court of justice; this fact, then, does away with the question of privileged communication. Where a telegraph company discloses the contents of a telegram in a court, in obedience to a subpoena *duces tecum*, this would be a lawful and compulsory disclosure, and not an intentional, willful or unlawful disclosure as meant in the second mentioned statute. The same rule would apply when the provisions of the statute stand unqualified since in the construction of such enactment, an exception in favor of due legal process is always implied.⁹

§ 716. Same continued—not protected by postal laws.

It has been said in a previous section that the contents of messages in the hands of telegraph companies were not, in the absence of statutes to that effect, protected under the principle of public policy similar to that which exists in favor of letters sent through the mail. While there is a difference of opinion on the subject, the better view is that these statutory provisions do not change the rule. "There is no such analogy between the transmission of communications by mail, and their transmission by telegraph, as would justify the application to the latter of the principles which obtain in respect to the

⁹ Brown Ex. parte, 7 Mo. App. 484.

former; and certainly penal statutes relating to the one, cannot by the courts be declared applicable to the other."¹⁰

§ 717. When may be privileged communications.

The question which next presents itself is, Is a telegram in the hands of the telegraph company ever a privileged communication? It is very evident that a message which is not a privileged communication in the hands of the parties to it, is not a privileged communication in the hands of a telegraph company;¹¹ but where a message is a privileged communication in the hands of the parties to it, the question is not quite so clear. In other words, communications between husband and wife, attorney and client, and physician and patient are privileged communications while such remain undisclosed; but as soon as there is a disclosure of such communications to a third person, the latter is under no obligation, with respect to the privilege accorded under this rule of law, to retain such. Then, when a disclosure of such a communication is made to a telegraph company for transmission, does such a disclosure fall under disclosures made to a third persons as above stated? It very clearly does not. There is an exception to the above rule, and it is under this that the question can be negatively answered. Privileged communications do not lose their privilege in the hand of another who was informed of such merely as a necessary means of affecting them. Thus, a privileged communication between attorney and client does not lose its privilege in the hands of an interpreter whose aid was necessary to affect it,¹² and it is under this exception that a privileged communication in the hands of a telegraph company, simply as a means of affecting its purpose, is a privileged communication and cannot therefore be disclosed.¹³

¹⁰ Ex. p. Brown 72 Mo. 91, 37 Am. Rep. 426; Ex. p. Brown, 7 Mo. App. 484, 72 Mo. 83, 37 Am. Rep. 426; Woods v. Miller, 55 Iowa 168, 39 Am. Rep. 170; Com. v. Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712; Hensler v. Friedman, 2 Pars. Sel. Cas. (Pa.) 274; Nat. Bank v. Nat. Bank, 7 W.

Va. 546; In re Storer, 63 Fed. 564. See also, U. S. v. Hunter, 15 Fed. 712; U. S. v. Babcock, 3 Dill. (U. S.) 566.

¹¹ Leslie v. Harvey, 15 L. C. Jur. 9.

¹² Bemberry v. Bemberry, 2 Beor. 173.

¹³ 1 Greene on Ed. § 239.

¹⁴ 2 Br's. Purd. Dig. §§ 2, 3.

§ 718. Steps to obtain telegrams—in general.

Having considered the question whether telegrams in the hands of telegraph companies are privileged communications, and showing that they are not so considered, we shall now proceed to discuss the subject as to how they may be obtained from these companies in order that their contents may be disclosed in a court of justice. There have been different methods pursued to obtain private writings or documents which are in the hands of others, for the purpose of producing them in courts as material evidence of an issue involved. In equity, it has been held that a bill of discovery was the proper method to obtain these writings; and at common law, the plaintiff in a case could obtain these writings; and at common law, the plaintiff in a case could obtain an order to inspect the private documents in the hands of another for the purpose of preparing his pleadings.¹⁴ He could, also, under the common law procedure, serve notice on the person in whose possession the documents were, to present such in court. Yet, this method would not compel the person to protect such documents, but would only lay a ground for secondary evidence. The general and most common method pursued, where it is desired that the document shall be produced in court as evidence in the case at issue, is by summoning the person in whose possession the documents are, to come into court and bring such documents particularly described. The process is most generally a subpoena *duces tecum*. Where the documentary evidence is in the hands of one of the parties to the suit, whether such party is a telegraph company or some individual, the description of such document offers no peculiarity in their application to telegraph messages; but if such person, possessing these documents, is not a party to the suit and is compelled under a subpoena *duces tecum* to produce such in court, there is a peculiarity in its practical application to telegraph messages in the hands of telegraph companies. Under the first kind, the description of the document in the subpoena *duces tecum* must be made with reasonable certainty but no greater degree of particularity will be required than is practicable under all the circumstances.¹⁵ Under the latter rule it is

¹⁴ Wharton on Ed. § 742.

Morris v. Hermen, 1 C. & M. 29; 41

¹⁵ U. S. v. Babcock, 3 Dill. (U. S.)

E. C. L. 22.

566; Lee v. Augas L. R. 2 Eq. 59:

different. Telegraph companies are in possession of innumerable documents and messages, and in order that matters irrelevant to the point at issue shall not be disclosed, the subpoena *duces tecum* should describe the message desired with the greatest degree of certainty.

§ 719. Same continued—how further obtained—court inspection.

To obtain documents in evidence, under a subpoena *duces tecum*, a description, if possible, of such document should be made with such reasonable certainty as will not necessitate the production of other documents in court not relevant to the matter at issue. This often becomes a difficult matter, especially with respect to telegrams in the hands of telegraph companies. As said, a telegram in the hands of the parties to it, is as much their private writings as letters or other similar private documents; and because they are in the hands of the companies for transmission, does not cause the privacies of these to be lost and they can only be obtained by a proper legal process. They must, therefore be relevant to the matter at issue before they can be obtained under a subpoena *duces tecum*. Documents in the hands of private persons or corporations may not be so difficult of description, but the number of telegrams in the hands of telegraph companies are generally so very numerous that a rule describing the certainty with which the documents in the hands of the first kind, would doubtless be so comprehensive as to embrace many messages which would be irrelevant to the matter at issue; so the rule in this respect should therefore be more specific. It is true, as stated, that it is difficult to describe the documents or telegrams in the hands of telegraph companies with such accuracy every time as to prevent the production of some which are irrelevant, but the greatest degree of accuracy under the circumstances should be made; and if there should be some such produced with those relevant to the issue, the court, on inspection of same, should not admit their disclosure in evidence.

§ 720. Rule for describing message in writ.

This question is a matter of such great difficulty of comprehension that the courts are not at all harmonious in their opinions, and it has, theretofore, become almost impossible to lay down a fixed rule which

would be applicable in every particular case, but each case must be considered somewhat alone. In nearly every case where the party who has the writ issued cannot specify with accuracy, messages relevant to the matter at issue, yet he generally knows the names of the parties to the messages, the places from and to which they are sent, the subject-matter about which they have reference, and the time of sending. If, then, these writs contain with reasonable certainty these essential facts, the company will have sufficient notice as to what messages are desired and can, therefore, be compelled to produce such in a court of justice. In accordance with this rule, the following illustrated cases may tend to further show when the specifications contained in these writs are valid and when invalid.

§ 721. Same continued—illustrations—valid services.

A writ of *duces tecum* served upon a telegraph company, containing the following demands for messages, was deemed valid:¹⁶ "Copies of all telegrams received through the office of the Western Union Telegraph Company at Long Branch, in the State of New Jersey, from June 15 to Sept. 15, 1874, and from June 15 to September, 1875, addressed to General C. E. Babcock, signed John McDonald, John A. Joyce, John, or J., with books showing the delivery of the same; all telegrams sent from Long Branch through said office during said months, signed O. E. Babcock, O. E. B., Bab., or B., addressed to John McDonald, or John A. Joyce, St. Louis, Mo., or Ripon, Wisconsin; all telegrams sent through the office of said company at the City of New York upon the 9th, 10th, or 12th days of December, 1874, signed John McDonald, John Mac, or Me., addressed to John A. Joyce, St. Louis, Mo., or General O. E. Babcock, Washington, D. C.; also, copies of all telegrams received at the City of New York, from said City of St. Louis, on the 26th, 27th, 28th, and 29th days of October, 1874, addressed to Mr. John A. Joyce, Mrs. Kate Joyce, Kate Joyce, or Kate M. Joyce, together with books showing delivery of same."

¹⁶ U. S. v. Babcock, 3 Dill. (U. S.)
566.

§ 722. Same continued—when invalid.

On the other hand, a writ containing the following demand for messages was held invalid:¹⁷ "Dispatches between Dr. J. C. Nidelet and A. B. Wakefield, and William Ladd and J. C. Nidelet, and William Ladd and Dr. Nidelet, between Warren McChester and A. B. Wakefield, between Warren McChester and J. C. Nidelet, between the latter and John S. Phelps, between A. B. Wakefield and John S. Phelps, between the latter and William Ladd, and between George W. Anderson and A. B. Wakefield, sent or received by or between any or all of said parties, within fifteen months last past." Again, a writ containing a demand for all messages sent from or received at a certain telegraph office between the sixth and twentieth days inclusive of a certain month, was deemed to be invalid.

¹⁷ Brown Ex. parte, 72 Mo. 83, overruling; 7 Mo. App. 484.

CHAPTER XXXI.

CONTRACTS BY TELEGRAM.

- § 723. In general.
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§ 723. In general.

In creating a contract, the negotiations pertaining to same may be conducted by letter, as is very common in mercantile transactions.¹ The contract is complete when the answer, containing the acceptance of a distinct proposition, is dispatched by mail or otherwise, provided it is done with due diligence after the receipt of the letter containing the proposal, and before any intimation is received that the offer has been withdrawn. Mailing the answer containing the acceptance and thus placing it beyond the control of the party, is valid as a constructive notice.² As has been seen, there is no material dif-

¹ *Kimball v. Moreland*, 55 Ga. 164; 382; *Patrick v. Bowman*, 149 U. S. 411, 13 St. Ct. Rep. 866, 37 L. Ed. 790.
Dana v. Short, 81 Ill. 468; *Thomas L. & T. Co. v. Beville*, 100 Ind. 309; Col-
² *lege Mill Co. v. Fidler*, 58 S. W. (Tenn.) 477.

ference in communications carried on by telegraph and correspondence conducted through the mail; it is, therefore, generally held, that the same law is applicable to both.³ These facts being true, there is no reason—and it is generally so held⁴—why contracts cannot be as easily negotiated by the medium of the telegraph as through the mail, and be governed by the same rules of law applicable to the latter.⁵

§ 724. Alteration of telegram does not affect rule.

It is true that the terms of a contract are more liable to be changed or altered if conveyed by telegram than they would be should they

³ *Illinois*.—Haas v. Myers, 111 Ill. 421, 53 Am. Rep. 634; Cobb v. Force, 38 Ill. App. 255.

Indiana.—Miller v. Nugent, 12 Ind. App. 348, 40 N. E. 282.

Kentucky.—Calhoun v. Atchinson, 4 Bush 261, 96 Am. Dec. 299.

Maine.—True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 156.

Maryland.—Curtis v. Gibney, 59 Md. 131.

Missouri.—Whaley v. Hinchman, 22 Mo. App. 483.

New Jersey.—Hallock v. Commercial Ins. Co., 26 N. J. L. 268.

New York.—Beach v. Raritan, etc., R. Co., 37 N. Y. 457; Schouberg v. Chemy, 3 Hun 677; Trevor v. Wood 41 Barb. 255 (reversed in 36 N. Y. 307, 1 Transer. App. 248, 93 Am. Dec. 511); Marshall v. Eisen Vineyard Co., 7 Misc. 674, 28 N. Y. Sup. 62, 58 N. Y. St. 375.

Tennessee.—College Mill Co. v. Fedler, 58 S. W. 382.

United States.—Minnesota Linseed Oil Co. v. Collier White Lead Co., 4 Dill. 431, 17 Fed. Cas. No. 9635.

England.—Stevenson v. McLean, 5 Q. B. D. 346, 49 L. J. Q. B. 701, 42 L. T. Rep. U. S. 897.

Canada.—Thorne v. Barwick, 16 U. C. C. P. 369; Marshall v. Jamison, 42 U. C. Q. D. 115.

⁴ *Meinett v. Snow*, 3 Idaho 112; *Robinson Match Works v. Chandler*, 575; *Richmond v. Sandburg*, 77 Iowa 255, 42 N. W. 184; *Post v. Davis*, 7 Kan. App. 217; *Franklin Bank v. Lynch*, 52 Md. 279, 36 Am. Rep. 375; *Brawer v. Show*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387; *Taylor v. Steamboat Robert Campbell*, 20 Mo. 254; *Hammond v. Beeson*, 15 S. W. (Mo.) 1000; *Isaac Joseph Iron Co. v. Richardson*, 38 U. N. C. (Pa.) 487; *Eckert v. Schoch*, 155 Pa. St. 530; 26 Atl. 654; *Short v. Thredgill*, 3 Tex. App. Cas. 266; *Duble v. Botts*, 38 Tex. 312; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127; *Wells v. Milwaukee, etc., R. Co.*, 30 Wis. 605; *Saveland v. Green*, 40 Wis. 431; *Utley v. Donaldson*, 94 U. S. 29; *Alford v. Wilson*, 20 Fed. 96; *Central Trust Co. v. Wabash, etc., R. Co.*, 38 Fed. 561; *Garrettson v. Atchinson Bank*, 39 Fed. 163, 7 L. R. A. 428, 47 Fed. 867, *affd.* (C. C. A.) 51 Fed. 168; *Schultz v. Phoenix Ins. Co.*, 77 Fed. 375; *Andrews v. Schrieber*, 93 Fed. 367.

⁵ *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. (U. S.) 431; *Trevour v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Shaveland v. Green*, 40 Wis. 431.

be sent by mail. In the course of communication of news by telegram, there are many hindrances to be encountered which are often unavoidable. The wires of the company may often become heavily charged with electricity as a result of an abnormal atmospheric condition, and this fact always has the effect of disturbing the communication of news so as to prevent a correct transmission; the same effect will be produced as a result of the wires being covered with ice or sleet, or when they have become crossed. So, also, the communication conducted by the latter means is more often interfered with by acts of the public enemy, or by strikes of the company's employees. It is also a more difficult way of transmitting news, and unless the employees are skilled and experienced workmen, alterations or changes in the messages are more likely to be made than if the same had been communicated by mail. The fact that an alternation has been made does not, however, change the application of the law to these. The messages as delivered to the addressee contains the terms of the contract upon which he must act, provided the same is done in good faith. While the sender of the message is bound by the terms of the contract as received, yet he may have recourse against the company for negligently transmitting the message.⁶

§ 725. When not the result of the company's negligence.

It must be understood, that the above rule only applies where the alteration of the telegram has been the result of the negligent act of the company in transmission and such as it would be liable for. We have said elsewhere, that if a loss has occurred in the transmission of messages on the company's lines by the act of God or the public enemy, the latter would not be liable. Then, if the alteration in the telegram is the result of any of these causes, and not that of the company's negligence, the sender will not be liable. In other words, if a telegram, containing the terms of a contract, has been altered in any material way in its transmission as a result of the act of God or the public enemy, the sender cannot be held bound by the terms of the contract in its altered state as accepted by the addressee. It is no

⁶ West. U. Tel. Co. v. Shotter, 71 Ga. 760; Ayer v. West. U. Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; Magie v. Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660; Saveland v. Green, 40 Wis. 431.

contract, as the minds of the contracting parties have never come together, either through themselves or through the instrumentality of these companies as an agency. It is true, that a question of this kind would seldom occur. Where these companies are interfered with in the transmission of news by such unavoidable hindrances, the general observation is, that a complete failure has resulted in sending the news.

§ 726. Same continued—private institution—does not effect.

The same law is applicable to the creation of contracts whether they have been negotiated by mail or by telegram, and this, too, notwithstanding the fact that the telegraph companies, unlike the post-office, are private institutions, owned and operated by private individuals.⁷ As was said by an able text-writer on this subject: "This distinction is immaterial, it seems, upon the question whether either a telegraph company or the post office is the agent of a private individual to complete a contract in his behalf. A telegraph company is employed to communicate a certain message. It neither undertakes, nor is authorized to go further, and effect as an agent, the purposes for which the communication of that message is desired by the employer. It is simply a forwarder of messages."⁸

§ 727. What must contain.

In order that a contract may be negotiated through correspondence or by mail, the letters pertaining to such must contain sufficient matter to show that an offer has been made and accepted. When the cardinal points of a proposed contract are definitely agreed upon by letter, the mere fact that in the course of the correspondence reference has been made to a more formal agreement will not deter the court from considering the agreements arrived at by the letters as concluded. The same rule applies to contracts made by telegram. If the telegrams in regard to such contract contain sufficient elements to constitute a contract, and it is evident from these that the contract has

⁷ *Dickson v. Renters' Tel. Co.*, 2 C.

P. D. 62, 19 Moak, 313. *aff'd.* 3 C.

P. D. 1, 30 Moak, 1.

⁸ *Gray on Tel.* § 113.

been accepted, the parties will be bound by such contract,⁹ although, during the communication, more formal contracts may have been referred to: and a court would not hesitate to consider the agreements arrived at by telegram as concluded.¹⁰ It is presumed that if there are two conflicting contracts made by the same parties, at different times in regard to the same subject-matter, the last made should be more valid and enforceable. Where, however, the contract is to be made out, partly by telegrams and partly by parol evidence, the whole becomes a question for the jury.¹¹

§ 728. When offer is complete.

When an offer or proposition is made by mail or by telegram, it is not complete until it has been delivered to the sendee. The party making an offer—the same to be delivered by this means—appoint this agency to make the delivery. The postal system or telegraph being an agent of the sender, the offer is not complete so long as it remains in the hands of the agent, but so soon as it is delivered to the party to whom the offer is made, it then becomes complete. If there are any delays or mistakes made during the transmission of the offer, the party sending same must suffer the consequence.¹²

§ 729. Order made by telegram.

An order for goods or merchandise may be, and often is, made by telegram. The question which we desire to discuss in this connection is, When does the order take effect or become a sale, where nothing

⁹ Calhoun v. Atchison, 4 Bush 261. 96 Am. Dec. 299.

¹⁰ Cayley v. Walpole, 22 L. T. N. S. 900, 18 W. R. 782; Johnson v. King, 2 Bing. 270, 9 Moore 482. But the telegrams or letters or both, must contain sufficient matter to show that a contract was made and accepted: Brewer v. Harst, etc., Co., 127 Cal. 643, 50 L. R. A. 240n, 60 Pac. 418. See, also, Cox v. Maxwell, 151 Mass. 336, 24 N. E. 50; Short v. Threadgill, 3 Tex. App. Cas. 268; Society Anonyme, etc., v. Old Jordan Min., etc., Co., 9 Utah 483, 35 Pac. 492; Lawrence v. Milwaukee, etc., R. Co., 84 Wis. 427, 54 N. W.

797; Utley v. Donaldson, 54 U. S. 29, 24 L. Ed. 54; Central Trust Co. v. Wabash, etc., R. Co., 38 Fed. 561; Alford v. Wilson, 20 Fed. 96.

¹¹ Blockow v. Seymour, 17 C. B. U. S. 107. See, also, Cox v. Maxwell, 151 Mass. 336, 24 N. E. 50; Short v. Threadgill, 3 Tex. App. Cas. 267; Society Anonyme, etc., v. Old Jordan Min., etc., Co., 9 Utah 483, 35 Pac. 492.

¹² Averill v. Hedge, 12 Conn. 424; Mactier v. Fritch, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Frith v. Lawrence, 1 Paige (N. Y.) 434; Adams v. Lendsell, 1 B. & Ald. 681, 19 Rev. Rep. 415.

is said in the message in this regard? If the message should request that a reply be given so as to notify the sender whether the order could be filled, there would be no doubt about when the order would take effect. The order, in this instance, would be filled when the reply was given to the telegraph company. The difficult question to be determined is, when will the sale be complete when nothing is said about a reply? If the goods are to be delivered to the carrier by the party on whom the order is made, and the carrier is designated in the order, it seems that a delivery to the carrier or warehouse company would be a sufficient acceptance of the order. If, however, no carrier is mentioned in the order, but other goods which have been purchased by the same party were delivered to a certain carrier, it seems that the party on whom the order was made would be justified in delivering the goods to the same carrier, and the acceptance would then be complete. The circumstances of each particular case may be different, and, of course, under this state of facts the same rule would not apply to both.

§ 730. Communication both by post and telegraph.

In order to create a contract by means of correspondence, it is not necessary that all the negotiations should have been conducted by post nor by telegraph, but it may have been created both by correspondence by post, and by communications by telegraph. In other words, some of the communications may have been made by mail and others by telegraph. And it seems that if it is not necessary that the contract should be in writing, as required by the statute of frauds, oral statements made when the contracting parties are together, or made by telephone, may be used in connection with the telegrams to prove the contract. As it has been elsewhere discussed, to make some contracts binding, some written memorandum must have been kept, and, also, that a memorandum might be made by telegraph. So, if there have been oral statements made respecting the creation of a contract which is required to be in writing, they may be considered in connection with such telegrams to explain the contract as made.

§ 731. When contracts take effect.

It is the rule of law that when a contract is made by means of correspondence through the mail, the contract is complete upon the post-

ing by one party of a letter addressed to the other, accepting the terms offered by the latter, notwithstanding the fact that such letter may never reach its destination.¹³ The reason of the rule is obvious. He who makes a proposition or an offer through the mail impliedly appoints the postal system his agent, and when the other party accepts the proposition or offer, and in accordance therewith delivers a properly addressed letter to said agent to be conveyed to the first party, the acceptance is sufficiently made. Applying the same rule to contracts negotiated by means of the telegraph, we find it is generally held that when an unconditional offer is made through this means, and a telegram containing an acceptance of the terms of such contract is delivered to the telegraph company by the offeree, the contract is complete whether the message does or does not reach the other party.¹⁴

§ 732. There must be a distinct and definite offer.

In order for the contract to be sufficiently created by telegram, the offer therein must be very distinct and definite. In a case arising on this point, it appeared that the plaintiff's agent wrote to him stating that he had "hit on" a desirable piece of property which could be bought on certain terms, and advising him to respond by wire if a purchase was desired. Plaintiff replied, instructing the agent to close the contract, but the telegram was not delivered for several days and the opportunity to make the purchase was lost. It was held

¹³ *Blake v. Ins. Co.*, 67 Tex. 160; *Butterfield v. Spencer*, 1 Basw. (N. Y.) 1; *Maetier v. Frith*, 9 Wend. (N. Y.) 103; *Vassar v. Camp*, 14 Barb. (N. Y.) 354.

¹⁴ *Illinois*.—*Cobb v. Force*, 38 Ill. App. 255. Compare *Maetay v. Harvey*, 90 Ill. 525, 30 Am. Rep. 35.

Maine.—*True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156.

Maryland.—*Wheat. v. Cross*, 31 Md. 91, 1 Am. Rep. 28.

Massachusetts.—*Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec.

157; *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278.

New York.—*Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511.

Pennsylvania.—*Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339.

Wisconsin.—*Baker v. Holt*, 56 Wis. 100, 14 N. W. 8.

United States.—*Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. 431; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390.

England.—*Stevenson v. McLean*, 5 Q. B. D. 346; *Household F., etc., Co. v. Grant*, 4 Ex. D. 216.

that the correspondence did not constitute a contract, there having been no distinct offer.¹⁵ In another case, similar to this, a person made another an offer to purchase his land, to which the owner of the land replied by telegraph, "Will accept \$900 if not sold otherwise." Soon afterwards, the owner sold the land to a third party with whom he had been negotiating before he sent the telegram. It was held that the message did not constitute an absolute agreement to sell.¹⁶

§ 733. Offer requiring actual receipt of acceptance.

The rule that a letter or telegram of acceptance takes effect when it is mailed or delivered to the telegraph company, does not apply, of course, where the offer requires actual receipt of the letter or telegram of acceptance; as where it says: "Unless I receive your answer by a certain time, I will not consider myself bound,"¹⁷ or where the offerer requests an answer by telegraph, "yes" or "no," and states that unless he receives the answer by a certain day he will conclude "no." It was held in this case that the offer was made dependent upon the actual receipt and not the mere sending of the telegram.¹⁸ Such a condition may in some cases be implied from the nature and form of the previous negotiations.¹⁹ Thus, where the message requested the offeree to answer "yes" or "no," this shows that it was in the contemplation of the parties that this telegram should not merely have been deposited for transmission, but that it should have been transmitted and been received before there could arise between the parties any complete contract.

§ 734. Same continued—how request implied.

The request or authorization to communicate the acceptance of the offer by telegraph may be implied in either of two ways, viz.: (1) the telegraph is used to make the offer, as where a person makes an offer to another by a telegraphic message and says nothing as to how

¹⁵ *Alexander v. West. U. Tel. Co.*, 76 Miss. 386, 7 So. 280.

¹⁶ *Ford v. Gebhardt*, 114 Mo. 298. See, also, *West. U. Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844; *Breckinridge v. Croker*, 78 Cal. 529.

¹⁷ *Lewis v. Browning*, 130 Mass. 173

¹⁸ *Langdell on Contracts*, §§6, 11, 15.

¹⁹ *Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634.

the answer shall be sent; and (2) where the circumstances are such that it must have been in the contemplation of the parties that, according to the ordinary usage of such parties, the telegraph might be used as a means for such purposes.²⁰ Therefore, where an offer is made by post, it is presumed that the acceptance of the offer shall be made by post; but if the offer is made by telegram, it is presumed that the acceptance should be made by telegraph.

§ 735. Acceptance must be made within time.

In order for an acceptance to be good, it must be made within the time allowed in the offer. If there is no such time specified, it should be made within a reasonable time after the receipt of the offer. An offer comes to an end at the expiration of the time given for its acceptance, a limitation of time within which an offer is to run being equivalent to the withdrawal of the offer at the end of the time named.²¹ But when no time is fixed in the offer, it expires at the end of a reasonable time.²² What is a reasonable time, depends upon the nature of the offer and the circumstances of the particular matter about which the offer is made.²³ Thus, if it should be in regard to the sale of land, it seems that it is not necessary that so prompt a time be exercised as it would in case it were concerning the sale of chattels, stocks or perishable property.²⁴ In a case bordering on this point, a

²⁰ *Hawthorn v. Fraser*, 2 Ch. 27, 61 L. J. Ch. 373, 66 L. T. Rep. U. S. 439, 40 Wkly. Rep. 434.

²¹ *Maclay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35; *Cannon River Mfg. Assoc. v. Rogers*, 42 Minn. 123, 43 N. W. 792, 18 Am. St. Rep. 497; *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *Union Nat. Bank v. Mills*, 106 N. C. 347, 11 S. E. 321, 19 Am. St. Rep. 538; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

²² *Sanford v. Howard*, 29 Ala. 684, 68 Am. Dec. 101; *Ferrier v. Sover*, 63 Iowa 484, 19 N. W. 288, 50 Am. Rep. 752; *Mitchell v. Abbott*, 86 Me. 338, 29 Atl. 1118, 41 Am. St. Rep. 559, 25 L. R. A. 503; *Morse v. Bellows*, 7 N.

H. 549, 28 Am. Dec. 372. When a telegram making an offer and demanding an immediate acceptance is received at 10 o'clock Saturday night, the sender is not bound by an acceptance sent on the following Monday. *James v. Marion Fruit Jar, etc., Co.*, 69 Mo. App. 207.

²³ *Averill v. Hedge*, 12 Conn. 424; *Lovemon v. Jordan*, 56 Ill. 204; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Rep. 752.

²⁴ *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Park v. Whitney*, 148 Mass. 278, 19 N. E. 161; *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. 431, 17 Fed. Cas. No. 9635.

person went west to purchase a drove of cattle. If there was an opportunity to purchase at a reasonable price he was to wire another person of same and the latter was to arrange for part of the payment at a certain time. The latter did not make such arrangement at the time, but came later and claimed his interest in the purchase. It was held that he was too late. "It was essential that he should have performed before. . . . That he could not, after leading Myers to think that he did not want an interest in the purchase, and the latter and Martin raising and paying all the purchase money required, come in afterwards, though only the next day, and then offer to pay his share of the money, and demand the right of participation in the purchase. To have then admitted Haas into the purchase would have been but a matter of favor with Myers, not of obligation."²⁵

§ 736. Revocation of offer.

It is a general rule that where an offer is made, not under seal, it may be revoked at any time before acceptance, unless there is a binding agreement to hold it open, but it cannot be revoked after acceptance.²⁶ In order that the offer should be revoked, it is necessary that the same be communicated to the offeree before he accepts the offer.²⁷ Formal notice of such revocation is not always necessary. It is sufficient if the person making the offer makes some act inconsistent with it, as where he sells the property to another person, and the offeree knows of such sale before he accepts.²⁸ If an offer is sent by telegram and, in accordance to the regulations of the company's office, the sender is unable to recall his telegram, he may do so by other means if possible before it is accepted;²⁹ as, by a second telegram

²⁵ *Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634.

²⁶ *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341; *Idle v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902.

²⁷ *Arkridge v. Glover*, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 44; *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Dambmann v. Lonitz*, 70

Md. 380, 17 Atl. 389, 14 Am. St. Rep. 364; *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. Rep. 646, 36 L. Ed. 479.

²⁸ *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417.

²⁹ *Newcomb v. De Roose*, 2 E. & E. 271, 6 Jur. U. S. 68, 29 L. J. Q. B. 4, 8 Wkly. 5, 105 E. C. L. 271.

sent by the same means and delivered at the same time with the first telegram;³⁰ or, by a telegram received by the offeree before he has delivered his telegram to the company accepting the offer.³¹ But a revocation of an offer not actually communicated to the person to whom the offer is made, or which is communicated to him after the acceptance has been sufficiently made, is inoperative.³² So it follows, that a revocation of an offer made by telegram can have no effect, unless the same is communicated to the offeree before the acceptance.³³

§ 737. Contract—what law governs.

It is the general law of contracts, as discussed elsewhere, that the rights of the parties must be governed by the laws of the state where the property is situated and where the contract and conveyance are made, unless it is clearly shown that the conveyance was intended to take effect in another state.³⁴ Thus, where a Mississippi plantation was leased in a contract made by telegram to parties living in the State of Kentucky, and an action was brought in the latter state to recover the rent which was not stipulated as to when it should be paid, it was held that the time of payment must be determined by the laws and customs of the state where the land was situated, the contract was to be performed, the landlord lived, and where in legal contemplation the contract was made.³⁵

§ 738. Telegraph company ordinarily the agent of sender.

An agent may be appointed by implication. Thus, the appointment of an agent may be implied from the fact that a person is placed in a situation in which, according to ordinary usage, he would be understood to represent and act for another.³⁶ So, it can, in general, be said that the manner in which a party treats one who apparently

³⁰ *Sherwin v. Nat. Cash Reg. Co.*, 5 Colo. App. 162, 38 Pac. 392.

³¹ *Re London, etc.*, 81 L. T. Rep. U. S. 512.

³² *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28; *Braner v. Show*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 378.

³³ *Cobb v. Force*, 38 Ill. App. 255.

See, also, *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390.

³⁴ *Wyse v. Dandridge*, 35 Miss. 672, 72 Am. Dec. 149; *Young v. Harris*, 14 E. Monroe (Ky.) 556, 61 Am. Dec. 170; *Galliano v. Pierre & Co.*, 18 La. Ann. 10, 89 Am. Dec. 643 and note.

³⁵ *Calhoun v. Atchinson*, 4 Bush (Ky.) 261, 96 Am. Dec. 299.

³⁶ *Evans on Agency* (Ewell's Ed.) 23.

acts as his agent, and holds him out as such to third parties, will be a sufficient implication of agency.³⁷ It is a general rule that when the post is used as a means of conveying news respecting a certain transaction, the party first selecting the post for such purpose impliedly appoints this instrumentality as an agency for consummating the transaction and it is therefore his agent. However, the extent of employment of such agent is merely to convey the letter and deliver it to the other party when called for. The same rule applies to telegraph companies, whereby they are ordinarily considered the agent of the party sending the message.³⁸ The effect of the rule, as has been seen, is that when an offer has been made by telegraph, the contract is complete at the moment the acceptance is delivered to the company for transmission to the party making the offer. If the acceptance is delayed or changed in any way in the transmission, the sender will be bound nevertheless.³⁹ He assumes responsibilities for errors both ways.⁴⁰

³⁷ *South, etc., Alabama R. Co. v. Henlein*, 52 Ala. 606; *Shaffer v. Sawyer*, 123 Mass. 204; *Hull v. Jones*, 69 Mo. 587; *Singer Mfg. Co. v. Holdford*, 86 Ill. 455; *Houghton v. Maurer*, 55 Mich. 323; *Lowell v. Williams*, 125 Mass. 439.

³⁸ *Haubelt v. Rea, etc., Mill Co.*, 77 Mo. App. 672.

³⁹ *Georgia*.—*West. U. Tel. Co. v. Shotton*, 71 Ga. 760.

Illinois.—*Anheuser-Busch Brewing Assoc. v. Hatmather*, 127 Ill. 652, 21 N. E., 62, 4 L. R. A. 575, affd. 29 Ill. App. 316. See, also, *Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634.

Maine.—*Ayer v. West. U. Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353. See, also, *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156.

Massachusetts.—*Squire v. West. U. Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157.

Minnesota.—*Magie v. Herman*, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660; *Wilson v. Minneapolis, etc., R. Co.*, 31 Minn. 481, 18 N. W. 291.

Missouri.—*Asheford v. Schoop*, 81 Mo. App. 539; *Haubelt v. Rea, etc., Mill Co.*, 77 Mo. App. 672; *Taylor v. Steamboat Robert Campbell*, 20 Mo. 254.

New Hampshire.—*Howley v. Whipple*, 48 N. H. 487.

New York.—*Denning v. Roberts*, 35 Barb. 463; *Rose v. United States Tel. Co.*, 3 Abb. Pr. U. S. 408.

Pennsylvania.—*New York, etc., Print. Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338.

Texas.—*West. U. Tel. Co. v. Edsall*, 74 Tex. 329, 15 Am. St. Rep. 835.

Vermont.—*Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

Wisconsin.—*Saveland v. Green*, 40 Wis. 431.

⁴⁰ *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511, reversing 41 Barb. (N. Y.) 255. See, also, *Magie v. Herman*, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660; *Wilson v. Minneapolis, etc., R. Co.*, 31 Minn. 483, 18 N. W. 290; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

§ 739. Sender bound on message as received.

If a message is delivered to a telegraph company, containing an offer to sell merchandise at a certain price, and the company transmits it so as to contain an offer at a less price, the sender is bound to furnish the merchandise at the latter price, but he may recover from the company the damages sustained by complying with the order.⁴¹ So, also, if a land agent leaves a message directed to his principal, naming the price at which the property can be sold, and the company through error in the transmission raises the price, and the principal accepts the offer as received and executes a deed at that price, the agent is compelled to conclude the sale at the price first named by him yet the company would be liable to the vendor for the difference between the prices.⁴² The reason why the sender is bound by the terms of the message as received is, that the telegraph company is deemed his agent and he is therefore bound by the acts of such company with respect to the transmission and delivery of the message.

§ 740. Within the meaning of the statute of frauds.

We have commented at some length in a separate chapter on the statute of frauds with respect to a written message, offered for transmission, being a sufficient writing to constitute a memorandum and one which would bind the parties under such statute. We shall, therefore, be very brief at this place in discussing the part telegraph companies take in effecting such results. The fact of the telegraph company being the agent of the sender, will bind him by any of the former's acts in this respect. Thus, when the telegram is written out by the operator at the receiving station and delivered to the addressee, the act of such operator in writing and delivering the tele-

⁴¹ *West. U. Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; *Reed v. West. U. Tel. Co.*, 135 Mo. 661, 34 L. R. A. 492, 58 Am. St. Rep. 609, 37 S. W. 904. See, also, *Hasbrouck v. West. U. Tel. Co.*, 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 181; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673; *West. U. Tel. Co. v. Beals*, 56 Neb. 415, 76 N. W. 903, 71

Am. St. Rep. 682; *Hays v. West. U. Tel. Co.*, 70 S. Car. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731; *Pepper v. Tel. Co.*, 87 Tenn. 554, 4 L. R. A. 660, 10 Am. St. Rep. 699; *West. U. Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; *Pearsall v. West. U. Tel. Co.*, 135 Mo. 661, 58 Am. St. Rep. 609, 34 L. R. A. 492.

⁴² *Id.*

gram is the act of the sender.⁴³ The rule would not be changed if the sender fails to write the message. If he delivers it orally or communicates it by telephone to the company and it is written out by the operator, the statute will be sufficiently complied with. This is the holding both of the state and federal courts.⁴⁴

§ 741. Exception to the rule.

There are some exceptions to the rule that the telegraph company is the agent of the sender in consummating business transactions through the means of such company. There must be some intention shown either express or implied, that the company is to act as the agent of the sender, since if there are any acts or indications on the part of the addressee that the company shall not be the sender's agent, it will be presumed that it acts as the agent for the former. So, also, if there is a continued correspondence by telegraph, it is not presumed that the party making an offer or proposition has appointed the company his agent, but it is deemed the agent of the party who first makes it the medium of communication.⁴⁵ When this is the case, the party making the offer is not responsible for errors made in the transmission, and an acceptance of the offer is not complete until it has been actually delivered to the offerer. As it has been seen, this is not the case when the company acts as the agent for the party making the offer. Another exception to the rule that the telegraph company is the agent of the sender is, where he uses such company to consummate the transaction at the suggestion of the addressee, or the party to whom the offer is made.⁴⁶

§ 742. English rule.

The rule in England is different from that in the United States. It is held there that the company is not the agent of the sender, and that he is not, therefore, liable for any errors made in transmission. The addressee may have incurred great expense and trouble by acting on

⁴³ See note 14 for cases.

⁴⁴ *Id.*

⁴⁵ *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127. See, also, *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep.

901; *Culver v. Warren*, 36 Kan. 391, 13 Pac. 577.

⁴⁶ *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

an erroneous message, still he will be the party to lose.⁴⁷ The rule there is accounted for by the fact that the telegraph is part of the government service,⁴⁸ and yet it seems that this was not the case at the time the decisions above cited were rendered.⁴⁹ This rule has been followed by a few of our courts.⁵⁰

§ 743. Telegraph company an independent contractor.

A telegraph company, with respect to the transmission of news, is regarded as an independent contractor, and is liable to either party, the sender or the addressee, for its negligent transmission. It must not be understood that this statement is in conflict or is inconsistent with the principles heretofore discussed, that it is the agent of the sender. It may be the agent of the sender in affecting a contract with the addressee, as has been said, and, at the same time, be an independent contractor with respect to the contract made for transmitting the necessary negotiations to effect the first contract. In other words, if the contract is negotiated by means of a telegraph company, the latter is deemed the agent of the party who first uses this means of effecting the contract, but, aside from this, there is another contract made by such party with the telegraph company, as the other contracting party, whereby it is agreed for a valuable consideration that the latter will transmit the news which effects the making of the former contract. It is in this sense we consider the company an independent contractor; but it seems that this distinction is not observed by some.⁵¹ It is the rule, as we have said elsewhere, that, where a contract is negotiated by means of the postal system, the latter is deemed the agent of the party who first selects this means of communication; and, it is upon this theory, that the telegraph company

⁴⁷ *Herkell v. Pape* L. R. 6 Exch. 7. 40 J. J. Exch. 15, 23 L. T. Rep. U. S. 419. 19 Wkly. Rep. 106.

⁴⁸ *West. U. Tel. Co. v. Shotter*, 71 Ga. 760.

⁴⁹ 8 Jec. Fish. Dig. (Telegraph.)

⁵⁰ *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 4 L. R. A. 660, 10 Am. St. Rep. 699; *Harrison v. West. U. Tel. Co.*, 10 Am. & Eng. Corp. Cas. (Tex.) 600.

⁵¹ *Mississippi*.—*Shingleur v. West. U. Tel. Co.*, 72 Miss. 1030, 48 Am. St. Rep. 604, 18 So. 425, 30 L. R. A. 444.

North Carolina.—*Pegram v. West. U. Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557.

Tennessee.—*Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, 4 L. R. A. 660.

Texas.—*Harrison v. West. U. Tel. Co.*, 10 Am. & Eng. Cas. 600.

is considered the agent of the sender. We think that there is this distinction—however unimportant it may be—between these two means of communication with respect to the contract made for communicating such news: The postal system is under the control of the public service, and the contract made with it for delivering a letter to the addressee is not similar to that made with a telegraph company to transmit a telegram. In one, the consideration—if it is deemed that any at all has been given—is made indirectly, as by means of public revenues; but, in the other, the consideration is given directly by the sender in the way of charges or fees for the transmission. Therefore, if it should be held that the postal system is not an independent contractor in this light, it is for the above reason.

§ 744. Same continued—may be sued.

It was discussed elsewhere that a telegraph company could be sued by the sender for failing to correctly transmit a telegram entrusted to its care, or, in other words, it may be sued for a breach of contract. Then, how can it be sued in such a case unless there has been a contract made, and how can a contract be made unless it is an independent contractor in that particular instance? Where it acts as agent for the sender, it only acts as such to the extent of delivering the message in the words in which it was accepted for transmission; however, as between the sender and an innocent addressee, all losses caused by errors or mistakes in the transmission must be borne by the sender, yet he may recover his loss from the company.⁵² The general rule is, that the principal is bound by the acts of his agent while acting within the apparent scope of his authority. Then, when a person appoints a telegraph company as his agent to transmit and deliver a message, the duty of such agent is to transmit the message as received. If it has been altered in its transmission, it is presumed that this, as delivered to an innocent addressee, is the correct message or the one which it was employed to deliver.⁵³ It has been held that the sender is bound by the contents of the telegram as received, only

⁵² *Ayer v. West. U. Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353.

⁵³ *Pegram v. West. U. Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep.

557; *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 11 S. W. 782, 10 Am. St. Rep. 699, 4 L. R. A. 660.

so far as it is a faithful reproduction of what is sent.⁵⁴ But while the sender should not be bound to the company in such manner as to preclude him from maintaining a suit against it for a breach of its contract, yet he should be bound to an innocent addressee who has incurred great expense and trouble by acting on the erroneous message. Because, if either the sender or addressee must suffer for the negligence of the company, it should fall on the one first using the company to effect such transaction. We think the rule, however, would be otherwise if either of the parties to the telegram were acting in the capacity of agent for the other. This fact has been fully discussed elsewhere and we therefore deem it unnecessary to say more about the subject.

⁵⁴ *Pepper v. West. U. Tel. Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, 4 L. R. A. 660.

CHAPTER XXXII.

DISTRICT TELEGRAPH COMPANIES AND SUCH AS FURNISH "TICKERS."

§ 745. Introduction.

- 746. Same continued—duties and liabilities of.
- 747. Company furnishing "tickers."
- 748. Same continued—duties and liabilities.
- 749. Cannot discriminate.
- 750. Unreasonable stipulations—unenforceable.
- 751. Protection against unfair competition.

§ 745. Introduction.

We shall very briefly discuss in this chapter, district telegraph companies, and companies furnishing "tickers." District telegraph companies exist in most—if not all—of the large cities, and their business is principally, if not exclusively, to furnish messenger boys for the purpose of carrying parcels, messages and doing other errands when called upon at district stations of the company in the city. There is a distinction between the business purposes of these and ordinary telegraph companies. One is organized for the express purpose of transmitting and delivering news in general for the public, and the other is to transmit news for the public, but the news is generally in regard to employing a messenger of the company to perform message duties and such as is given above. The main purpose of these companies is to furnish these messenger boys, but the telegraphic system is used as a means of obtaining these messengers. It is not necessary to enumerate the many and different services which may be rendered by these messengers; but suffice it to say, that almost any commission or service may be performed by them.

§ 746. Same continued—duties and liabilities of.

The duties and liabilities of district telegraph companies are the same as those imposed upon ordinary telegraph companies, except in so far as both may be affected by the difference in the nature of their respective businesses as in particular cases.¹ Thus, such a company

¹ *Ferber v. Manhattan Dist. Tel. Co.*, 121 N. Y. 121. See, also, *West. U. Tel. Co. (C. Pl. Gen. T.)* 22 Abb. N. Cas. (N. Y.) 103. *v. Toledo*, 103 Fed. 746, 121 Fed. 734.

is liable for the loss of a package caused by one of its messengers delivering it contrary to the instructions of the sender.² In a case against one of these companies plaintiff hired a buggy and horses and on returning stopped at the office of the district telegraph company and asked for a boy who could drive the horses back to the livery stable. A boy was sent out who took charge of the horses, but owing to his negligence and incompetence, the horses ran away and injured themselves and the vehicle. It was shown in proof that the company had performed similar services for the plaintiff. It was held that the company was liable for the damages thus occasioned, also that though they were only bailees for hire, the plaintiff could maintain the action to recover such damages.³

§ 747. Company furnishing "tickers."

We have had an occasion to speak of this subject elsewhere; therefore, it shall only be lightly considered at this place. As seen, the ordinary business of a telegraph company is to transmit and deliver all proper news tendered it, after the charges have been paid, but these companies may assume greater duties, and, of course, the liabilities imposed for assuming this extra business is greater. Thus, in many instances, these companies are expressly organized for the purpose of collecting and distributing news, such as market reports and other news. When these extra duties are assumed, the company is not only under obligations to transmit correctly and deliver promptly all news, but it must also collect and distribute accurately and correctly all of such news. For instance, in collecting the market report, the same must be distributed exactly as it is reported on the market, and any deviation therefrom whereby a subscriber suffers loss, will be a loss for which the company will be liable. The business of these companies is to furnish each subscriber with an instrument, commonly called a "ticker," by means of which the report is received.

§ 748. Same continued—duties and liabilities.

These companies have the same general powers, and are subject to the same liabilities as ordinary telegraph companies, the difference

² American Dist. Tel. Co. v. Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479.

³ Id.

between the two being merely the method of doing business.⁴ While the measure of the liability of these companies is the same as that of the ordinary telegraph companies, so far as the nature of the business of the two is the same, yet when the additional assumption of collecting and distributing is undertaken, the liabilities of the former to this extent are greater. In other words, as stated, these companies must exercise the same care and diligence in transmitting the messages as is imposed upon ordinary telegraph companies, and in addition to this duty, they must also collect the news accurately. These companies may also make and enforce reasonable regulations with respect to the use of their "tickers" or "stock indicators" by their subscribers. One of their requirements is, that the subscribers shall not furnish the market reports to non-subscribers. It has been held that this requirement was reasonable and therefore enforceable.⁵ In the case cited it was held that the report could not be furnished to a firm of which the subscriber was a member.

§ 749. Cannot discriminate.

As it has been elsewhere discussed, an ordinary telegraph company cannot discriminate among those who engage or attempt to engage its services, but it must show the same favors to all who apply to it, after complying with all reasonable regulations. As has also been seen, telephone companies cannot discriminate among their subscribers, but the same privileges must be enjoyed by all alike. The same rule applies to these companies. They are engaged in a public employment and must, therefore, treat all their subscribers alike and not discriminate among them.⁶ They may, however, refuse to furnish their instruments to parties who are carrying on, through this means, a gambling house. The law will not force these companies to perform an act which is for an illegal purpose; and should they have contracted to furnish a gambling house with the market report, they may refuse to perform their part of the contract.⁷ When the plain-

⁴ See chapter 18.

⁵ *Shepard v. Gold Stock, etc., Tel. Co.*, 38 Hun (N. Y.) 338.

⁶ *Friedman v. Gold, etc., Tel. Co.*, 32 Hun (N. Y.) 4; *Smith v. Gold, etc., Tel. Co.*, 42 Hun (N. Y.) 454; *Metropolitan Grain, etc., Exch. v. Mutual U.*

Tel. Co., 11 Biss. (U. S.) 531; *Bradley v. West. U. Tel. Co.*, 27 Alb. L. J. 363.

⁷ *Smith v. West. U. Tel. Co.*, 84 Ky. 664, 2 S. W. 483. Compare *Gray v. West. U. Tel. Co.*, 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95.

tiffs are conducting a gambling house, equity will not compel these companies to furnish them with a "ticker," giving the quotations of prices ruling on the Chicago board of trade, although they are members of that board.⁸ If, however, the company is merely the agent of an exchange to communicate the market quotations, the rule would be otherwise. Under these circumstances, the exchange would only be the sender of the reports, with the right to name the addressee, and under no duty to furnish its quotations to the public.⁹

§ 750. Unreasonable stipulations—unenforcible.

These, as well as ordinary telegraph or telephone companies, cannot enforce an unreasonable stipulation. Any regulation or stipulation which would be against public policy, or in conflict with the law of the land, or which would give the company an advantage over its subscribers, could not be enforced. If there is a stipulation incorporated in the contract made with the subscriber, which provides that the company may discontinue its services or the furnishing of its instruments to the subscriber without notice, whenever, in its judgment, he has violated the contract, it cannot be enforced on account of its unreasonableness. The company, under such a stipulation, would be sole judge in its own case, and this could never be the case; since the subscriber would be deprived of his rights without due process of law.¹⁰

§ 751. Protection against unfair competition.

The market quotations and other similar news, collected by these companies and distributed or disseminated among their subscribers, are not within the protection of the copyright laws, yet such news constitute property, and the company will be protected in a court of equity against rival companies which seek to obtain such news of the company without proper authority, and to sell to their customers to

⁸ *Bryant v. West. U. Tel. Co.*, 77 Fed. 825.

⁹ *Matter of Reuville*, 46 N. Y. App. Div. 37. See, also, *Christie Grain, etc.*,

Co. v. Board of Trade, 125 Fed. 161, reversing 121 Fed. 608.

¹⁰ *Smith v. Gold Stock, etc., Tel. Co.*, 42 Hun (N. Y.) 454.

the injury or detriment of the former company's services.¹¹ While the news, before it has been collected by the company, may be free to all who may desire to obtain it, yet, as the company has worked to gather compiled or collect the same, it has a right to the exclusive use of it while in the company's possession.

¹¹ National Tel. News Co. v. West. U. v. Cleveland Tel. Co., 156 C. C. A. 198, 119 Fed. 205; Illinois Com. Co. v. Tel. Co., (56 C. C. A. 198) 119 Fed. 205; 60 L. R. A. 805.

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